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SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXXII.

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AMERICAN STATE REPORTS.

VOL. XXXII.

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AMERICAN STATE REPORTS.

VOL. XXXII.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

FLORIDA SOUTHERN RAILWAY Co. v. HIRST.

[30 FLORIDA, 1.]

CONTRIBUTORY NEGLIGENCE. — Although a person or corporation may be guilty of a negligent act from which injury results to another, yet, if the party injured has by his own negligence contributed to his receiving the injury, he cannot recover damages from the other.

RAILROADS — RULE AS TO PASSENGERS. — A rule of a railway company which requires that passengers shall remain in the cars set apart for them, and shall not ride in a baggage or an express car or other place of increased danger, is reasonable.

RAILROADS — RULES OF CONTRIBUTORY NEGLIGENCE OF PASSENGER. — It is contributory negligence for a passenger to ride in an express car, in violation of a known rule of the company, even with the permission, connivance, or knowledge of the conductor, or without his protestations, when that officer is cognizant of both the rule and its infraction, if by the violation of such rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart and offering space for his accommodation.

RAILROADS — DUTY TO ENFORCE RULES. — While it is the duty of a railroad conductor to enforce a rule of the company requiring passengers to ride in passenger cars, yet the obligation upon passengers and the protection of the company under such rule are not entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement.

RAILROADS — VIOLATION OF RULE — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — When a passenger voluntarily and knowingly violates a reasonable rule of a railway company, which is for his preservation from harm, and brings upon himself injury which he would not otherwise have received, by going from a passenger car into an express car or other place which cannot be regarded as intended for passengers, but naturally suggests that it is not for them, he cannot invoke the mere delinquency of the conductor in enforcing the rule as a defense to his contributory negligence. The burden of proof is upon him to show that he was justified in going and riding where he did.

RAILROADS — ABANDONMENT OF RULE — LIABILITY FOR NEGLIGENCE. —

When a railroad company has, by its conduct, abandoned a rule intended for the preservation of its passengers, by habitually permitting them and its employees to violate it, the company is precluded from claiming protection under the rule from liability for an injury caused by its negligence.

CONTRIBUTORY NEGLIGENCE DOES NOT PRECLUDE RECOVERY FOR RECKLESSNESS. —

When one person inflicts an injury upon another intentionally, or, though unintentionally, yet with a wanton and reckless disregard of its injurious consequences, he is guilty of gross or willful negligence, and the contributory negligence of the plaintiff is not a defense.

EXEMPLARY DAMAGES CAN BE ALLOWED IN CASES OF NEGLIGENCE only

when it is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness and recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Gross negligence is not confined to this extreme degree of negligence; therefore, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages.

RAILROADS — PERSON ON TRAIN WITHOUT PAYING FARE, WHEN ENTITLED TO RIGHTS OF PASSENGER. —

One injured in an express car of a passenger train who is known to the conductor, and has not been asked to pay fare, although he has sufficient funds therefor, and who up to six weeks prior to the accident had been an express messenger on the same train, but at the time of the accident was engaged in other business not connected with the railway company, cannot be said to be seeking to obtain a ride without paying fare, nor of practicing a fraud on the conductor or the company by passing himself off as an express messenger. On the contrary, his legal status is that of a regular passenger.

RAILROADS — ACTUAL PAYMENT OF FARE is not essential to the status of a passenger on a railway train.

J. R. Parrot and Robert W. Davis, for the appellant.

E. C. F. Sanchez, for the appellee.

RANEY, C. J. This is an action to recover damages received by Walter J. Hirst in a collision between two trains on appellant's railroad, Hirst being on a passenger train which was on its schedule time, and the other train being a special or extra train loaded with iron rails.

The rule as to negligence announced by this court in *Louisville etc. R. R. Co. v. Yniestra*, 21 Fla. 700, is that notwithstanding a person may be guilty of a negligent act from which injury results to another, still if the party injured has by his own negligence contributed to his receiving the injury, he cannot recover damages from the other party for such injury. The injury must have been caused solely by the negligence of the

former party to entitle the latter to recover. This decision, which we see no reason to disturb, necessarily, even though impliedly, repudiates the doctrine of comparative negligence, which has found favor in the Illinois and other courts; and it dispenses with the necessity of our noticing the citations from those states made by appellee's counsel. The injury in question was received prior to the passage of the act of June 7, 1887, chapter 3744, laws of Florida, and hence the provision of the first section of this statute as to diminishing damages in proportion to the amount of the default of the plaintiff, where both parties are at fault, has no application.

There is in the cause before us testimony to the effect that Hirst on boarding the train got on the passenger car; and that a rule of the Florida Southern Railway Company, appellant, forbade passengers from riding in any other than passenger cars, or, consequently, in the express car, in which car Hirst had gone and was at the time of the accident, he being about six feet from the fore end of it, and sitting on the iron express box; and that the plaintiff knew of such rule; and also to the effect that this car was next to the engine, and was a more dangerous place than the passenger cars, and was neither set apart as, nor was it in fact, the place where passengers usually rode, and was not arranged for them, nor had any seats, but was for the use of the express company; also that the plaintiff had ridden in the express car previously to the trip on the day of the accident in question, and that the conductor had been in there with him a short time, and that plaintiff had gone in there with the conductor and by his permission, or with his, at least, tacit consent; and tending to show that the conductor also knew that the plaintiff was in this car at the time of the collision between the passenger train and the special train loaded with iron rails. It was also testified that there was ample room in the passenger car, and that the plaintiff would not have been injured if he had been in the passenger car, and that he and the express agent were the only ones injured. There was no testimony tending to show that the conductor attempted to enforce the rule, or even suggested to the plaintiff the advisability of its observance, although the conductor says that plaintiff was not in the car by his permission. Hirst had not paid any fare, nor had the conductor applied to him for it.

Exceptions taken by the defendant to charges given to the jury, and to the refusal of one asked by the defendant, involve

an inquiry into the legal effect of a railroad company forbidding passengers to ride in parts of the train set apart for other purposes, and naturally more dangerous than passenger cars, and of the power of conductors to waive such rules.

In *Houston etc. Ry Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98, the deceased, when he received the injuries from which he died, was riding on a freight train, with the knowledge and consent of the conductor, but whether he had paid fare, or had a pass or permit, was not shown. He was the only person, except the employees of the company, on the train, and prior to a month or six weeks before his death had run on the company's road for a year or two as an engine-driver, and knew that passengers were not allowed to travel on the company's freight trains, and that officers in charge of such trains were forbidden to allow parties to ride on them without a special pass from the general superintendent of the road, which passes were not given, in view of the increased risk, without a release of the company from liability in cases of accidents to passengers. The decision of the court was that a regulation that freight and passengers shall be carried on separate trains is reasonable, and highly salutary to both the company and the public; and no one has the right to demand that he shall be allowed to ride on trains devoted exclusively to the carriage of freight, when the company makes other and suitable provisions for the transportation of passengers; and that a party who, in violation of such regulation and without the consent of the company, forces himself into one of its freight trains, cannot hold the company responsible to him as passenger, or recover of the company for injury thus contributed to by him while thus wrongfully on the train. That while it might be true that when the company should, notwithstanding such a regulation, habitually permit persons to travel on its freight trains it would be liable to such passenger the same as if he were on a regular passenger car; still, when there is such a regulation, and there are no cars attached to freight trains except those ordinarily accompanying trains exclusively of this character, or only such cars as by their appearance or the manner in which they are fitted up cannot be regarded as inviting persons on freight trains as passengers, the burden of proving that the party injured on such a train was justified in going on it as a passenger is upon him; and the conclusion of the court was that the evidence showed that the conductor

did **not** have authority to waive the regulation, and that the deceased must have known this.

In *Pince v. International etc. R'y Co.*, 64 Tex. 144, the injuries of the plaintiff were alleged to have been received through the negligence of defendant's employees while he was riding on a hand-car on which he was invited to ride, and on which he was received as a passenger, and that the company sometimes used such car for the transportation of passengers invited to travel on it by the proper agents of the company free of charge; and the questions arose on a demurrer to the petition. The order overruling the demurrer was affirmed, and it was held that a railway company is liable in damages to one who is injured by the negligence of its agents while traveling on a hand-car of the company, on which he had been invited to ride by the agent of the company in charge of the car free of charge, it appearing that such a car was sometimes used by the company for the transportation of passengers, and not shown that any regulation of the company prohibited traveling on such a car. In the opinion, the effect of the decision in *Houston etc. R'y v. Moore*, 49 Tex. 31, 30 Am. Rep. 98, is stated to be: That the question whether or not a passenger is lawfully on a train does not depend necessarily upon the purposes to which the train is usually devoted; if, however, the train is usually employed in the transportation of passengers, a person who has paid his fare or has been invited to ride free of charge is presumed to be lawfully on the train. That if by the rules of the company passengers are expressly forbidden to be carried upon particular trains, the presumption is that any one claiming to be a passenger upon such a train is an intruder, and without lawful right to be there; but this presumption may be rebutted by showing that, though the rules forbid the transportation of passengers on such trains, yet, with the knowledge of the company, and without objection on its part, persons are habitually permitted to take passage on them. That the company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them dispensed with when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rule on his part would be a disobedience of the orders of his superiors. The case of *Gulf etc. R'y Co. v*

Campbell, 76 Tex. 174, was one in which the plaintiff sued for personal injuries suffered when upon a freight train, and there was evidence that he was refused passage by the conductor, who told him he had no authority to carry passengers and could not; but that subsequently plaintiff was given permission to board the train by a man who stood on the platform and had a lantern in his hand, and in reply to the question if he had charge of the train answered affirmatively. It was held that plaintiff's presence on the train was not with the company's consent, and that he contributed to his injury, and among the charges held to have been improperly refused was one embodying what is set out above in the last three sentences relating to the Prince case.

In *Robertson v. New York etc. R. R. Co.*, 22 Barb. 91, a railroad company, by its printed rules and regulations, prohibited its engineers from allowing any one not in its employ to ride on the engines. The plaintiff applied to the engineer to ride upon his engine, and was informed that it was against the rules of the company to permit it, but finally consented, and plaintiff rode there, without the knowledge of the conductor and without paying fare; and it was held that the consent of the engineer conferred no legal right, and that the plaintiff, as he was not lawfully on the engine, was a wrong-doer, and that he could not recover damages for injuries incurred, through the negligence or want of skill of the defendant, while he was riding there; and further, that the *onus* was upon the plaintiff to show that the engineer had authority to permit him to ride on the engine, the presumption being that he had no right to be there, whether he paid fare or not. In the opinion it is said: "The plaintiff, without information on the subject from any of the defendant's agents or servants, had no right to presume that the engineer had authority from the defendants to permit him to ride upon the engine, especially as he paid no fare. The presumption was against his right to be upon the engine, whether he paid fare or rode free. The engine is not the place where even that class of passengers who pay no fare usually ride." *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513, is a case in which it is held that, where a railroad company makes, as it has the right to do, a complete separation of freight and passenger business, a freight conductor has such general authority only as is incidental to the business of moving freight, and no power as to the transportation of passengers; and notice of this limited au-

thority will be implied from the nature and apparent division of the business. It was further decided that the presumption is, that a stranger riding on a freight train is not legally a passenger and is not lawfully upon the train, and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut this presumption. The plaintiff was invited by the conductor of a coal train on defendant's road to ride in the caboose, with a promise to get him employment as a brakeman. No passenger car was attached to it, but in addition to the coal cars, only the caboose for carriage of train implements and the accommodation of the train employees. Through the negligence of the defendant's employees the train was run into by another, and plaintiff, while riding in the caboose, was injured. By a regulation of the defendant, printed for the use of the employees, passengers were forbidden to ride on coal trains, but of this plaintiff had no actual notice. It did not appear that passengers were permitted to ride, even occasionally, in the caboose.

The trial court instructed the jury that if the plaintiff was upon the train with the assent of the conductor, and without being informed of the regulation, the defendant was liable; but the conclusion of the court of appeals was that this was error; that there was nothing in the attendant circumstances indicating any apparent authority in the conductor to create between the parties the relation of passenger and carrier, or to make an arrangement for plaintiff's employment as a brakeman, and that the facts did not establish that the plaintiff was lawfully on the train.

The same rule as to the presumption that persons riding upon trains which are palpably not designed for the carriage of passengers is announced in *Waterbury v. New York etc. R. R. Co.*, 21 Blatchf. 314.

Pennsylvania R. R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651, presents a case in which one Langdon died from injuries received in a collision of trains, such collision resulting from a misunderstanding of orders by the conductor of the train on which Langdon was. On boarding the train he went immediately to the baggage car, and was engaged in conversation with the baggage master when the collision occurred, the train having proceeded but a short distance in a brief period of time. He was in the employ of the defendant company as a night inspector of locomotives at the outer Pitts-

burgh depot of the Pennsylvania Railroad, and was not at work on the branch road, the Western Pennsylvania Railroad, operated by defendant company, on which branch road he was killed. He was riding on a commutation ticket, such as were ordinarily sold to passengers, and is accorded the position of a passenger in the opinion. He lived on the line of the Western Pennsylvania Railroad, and was in the habit of riding to and from his home daily on that road. When injured, he was in the baggage car contrary to a printed notice posted in it forbidding any passenger from riding therein. It appeared that no harm would have occurred to the deceased had he gone into any other car on the train. The defense relied on was that he was in the baggage car in violation of the rule of the company, and with positive knowledge, as a railroad employee, that he had gone into a forbidden place, and was there at his own peril, and that by this unlawful act he had been the occasion of his death, and was guilty of contributory negligence. Plaintiff introduced evidence tending to show that Langdon was in the car with the implied assent of the conductor of the train, but not of express consent or permission to ride there.

It was held that a passenger who voluntarily leaves his proper place in the passenger car of a railroad train, and rides in the baggage car or other place of danger, in violation of a known rule of the company, and is injured in consequence of such violation, cannot recover damages for the injury, though the accident by which it was occasioned was the result of the negligence of the company, and that a railroad conductor cannot, in violation of a known rule of his company, license a passenger to occupy a place of danger—e. g., the baggage car—and by such license render the company responsible for injury incurred by the passenger in consequence of his violation of the rule; and that a conductor cannot waive a rule which, by its very terms, he is commanded to enforce; that he may neglect to enforce it, and if it is a mere police regulation, such neglect may amount to a waiver of it as between the passenger and the company, but not so when the rule is for the protection of human life, as is one prohibiting passengers from riding in places of increased danger.

In the opinion in the last case the Pennsylvania court draws a distinction between the violation of a rule whose object is the safety of passengers and those which are merely for the comfort of passengers or for the convenience of the railroad

company, observing that where the rule is for the convenience of the company the company will be liable unless the violation of the rule caused the accident, whereas, in the other case, it is sufficient to relieve the company that the injury was received in consequence of the violation of the rule; and this, notwithstanding the fact that the negligence of the company's servants was the cause of the accident. The opinion also states the distinction, and the want of any inconsistency, between Langdon's case and that of *O'Donnell v. Allegheny R. R. Co.*, 59 Pa. St. 239, 93 Am. Dec. 336, the conclusion in which case, it is said, was, on account of its facts, mainly upon the ground that the plaintiff and his associates had been riding in the baggage car daily for two months, under circumstances which would justify the jury in finding that their doing so was an arrangement for the benefit of the company, rather than as ordinary passengers; while, on the other hand, Langdon "was riding in the baggage car for his own convenience, and to have a chat with the baggage master, with whom he appeared to have been intimate." The court also distinguishes the case of *Lackawanna etc. R. R. Co. v. Chenewith*, 52 Pa. St. 382, 91 Am. Dec. 168, as one where the rule violated had no relation to the safety of the plaintiff as a passenger, the fact being that the plaintiff induced some of the company's employees, in the absence of the superintendent, to attach his freight car to a passenger train in violation of a rule of the company, he agreeing to run all risks and to attend to the brakes on his freight car; and that of *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St. 139, 27 Am. Rep. 693, where the plaintiff was riding in a caboose car, in violation of the rules of the company, on a mixed passenger and freight train, but it did not appear that the rule was one intended for the safety of the passenger, and was not claimed that the car was a place of danger.

In *Virginia etc. R. R. Co. v. Roach*, 83 Va. 375, the plaintiff, Roach, knew, or from the fact that he had been for months, until recently, an employee of the defendant company, should have known, that its rules forbid any one except the engineer and fireman to ride on its engines, yet, upon the invitation of the engineer or conductor, he got on the engine, and while riding there the train was negligently thrown off the track and he was injured; and the decision was that he could not recover. See also *Waterbury v. New York etc. R. R. Co.*, 21 Blatchf. 314.

The doctrine of these authorities as to the absence of power

in a conductor to waive rules intended for the safety of passengers is in effect approved in Beach on Contributory Negligence, 2d ed., secs. 151-154, and Patterson's Railway Accident Law, 288-290.

There are, however, other authorities which need to be noticed: Hutchinson on Carriers, sec. 654, and *Jacobus v. St. Paul etc. R'y Co.*, 20 Minn. 125; 18 Am. Rep. 360, and *Dunn v. Grand Trunk R'y*, 58 Me. 187; 4 Am. Rep. 267. The commentator named says: Even where the riding in such car is against the rules of the company, of which the passenger is informed, if he is in it with the knowledge of the conductor and without any attempt on his part to enforce the rule by removing the passenger, his presence there would not be such negligence as would exonerate the company from the consequence of its negligence or want of care. The doctrine of the stated Minnesota case, which he cites, seems to sustain his assertion, but the same cannot be said of such of the other cases cited by him as are within our reach: *Washburn v. Nashville etc. R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468, for in neither of these was there any question of the effect of a rule like that in question, and, according to what is said in *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 32, 37 Am. Rep. 651, the same observation is true of *Carroll v. New York etc. R. R. Co.*, 1 Duer, 571, a case not at hand, as it is of *Baltimore etc. R. R. Co. v. State*, 72 Md. 36, 20 Am. St. Rep. 545. Of the Minnesota case it may be observed that in *McVeety v. St. Paul etc. R'y Co.*, 45 Minn. 268, 22 Am. St. Rep. 728, where it was held that if a person knowingly induces the conductor of a railroad train to violate a rule of his company and carry him without charge, he is guilty of a fraud on the company and cannot claim the rights of a passenger, it is said, citing the second and third cases from Texas (*Prince v. International etc. R'y Co.*, 64 Tex. 144, and *Houston etc. R'y Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 93), and other authorities, that the same result follows if he rides upon a part of the train from which passengers are excluded, knowing that his act is against the rules of the carrier, and in permitting it the conductor is disobedient.

The case of *Dunn v. Grand Trunk R'y*, 58 Me. 187, 4 Am. Rep. 267, is one in which there was evidence tending to show that the plaintiff entered the saloon car attached to defendant's freight train; that the conductor saw him when the

train started, and they conversed together; that he paid the conductor the usual fare; that the saloon car was thrown from the track and plaintiff injured; and was also testimony tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers, but this was denied by the plaintiff. There were rules against passengers traveling on freight trains. The verdict was for plaintiff, and it was affirmed. Of this case it is properly said by the New York court of appeals, in *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513, that it, in its precise facts, is not opposed to the conclusions of the New York court in the case mentioned; that the Maine case was distinguishable from the other by payment of fare and the attachment of a "saloon car"; that it was not stated precisely what the saloon car was; that it might be assumed to be one fitted up for the accommodation of passengers, and the company might thus be assumed to have assented to a relaxation of its rules, and that the principle acted on was not to be extended beyond its precise facts.

The Pennsylvania court remarks correctly of the same cause in Langdon's case, 92 Pa. St. 21, 37 Am. Rep. 651: "There was no point that it was a place of danger," adding, "nor that the rule was intended for the safety of passengers." We will not go into any more critical examination of the Maine case, nor determine whether or not it should be regarded as having been treated, in the opinion of that court, as a case in which the passenger had no knowledge or notice of the rule. We will remark that in discussing the duty of passengers to comply with reasonable rules and the effect of employees' waiver of such rules, it is observed by Mr. Beach, in the second edition of his work on contributory negligence, sec. 154, citing numerous authorities, that with respect to the carriage of passengers on freight trains the rule is somewhat modified to the effect that whenever the company receives passengers upon their trains and collects fare from them, although it is done in violation of a rule of the company, it is lawful for the passenger to ride, and if, while so riding, he suffers an injury due to the company's negligence, he may have his action; the relation of carrier and passenger being created, notwithstanding the rule, when the passenger is received on the freight train and allowed to pay his fare. An admission of the entire correctness of this proposition is, however, not inconsistent with our conclusions in the case before us, considering its facts.

The law requires of railroad companies the exercise of the highest degree of care for the safety of passengers traveling upon their trains. This care is not due only to the individual as such, but it is also a public duty for the protection of the state's citizens.

It would be a strikingly odd system of jurisprudence which, while exacting of the operators of this very dangerous yet highly useful means of transportation the duty of extreme care toward those whom they undertake to carry, yet would refuse to permit such transportation companies to require of passengers that they, while being transported, shall confine themselves to the places provided for them as most conducive to their safety, and abstain from riding in parts of a train of greater danger, and set apart for other purposes. Such a system of law would present the hurtful incongruity of demanding a result indispensable to the safety of the traveling public, while in the same breath inhibiting an essential of such result. The preservation of the life and limb of the passenger requires that he shall conduct himself consistently with and not in antagonism to the maintenance of his safety, and this duty involves that of observing all rules of the railroad company which may be reasonably necessary to his protection from harm. A rule which requires that passengers shall remain in the cars set apart for them, and shall not ride in a baggage or an express car or other place of increased danger, is unquestionably reasonable, and is within the power of a railroad company. See also *Toledo etc. R'y Co. v. Brooks*, 81 Ill. 245, 250.

In view of the law as it is shown above to be, there was error in the following charge given to the jury: "If you believe from the evidence that the conductor in charge of the defendant's train at the time of the accident knew that the plaintiff was traveling on the train the day the accident occurred, and before the accident occurred, and that the conductor knew that the plaintiff was in the express car and did not forbid his being there, then the court charges you that the plaintiff's being there at the time of the collision would not be contributory negligence on the part of the plaintiff."

"If it is contrary to the rules of the defendant company for passengers on its passenger trains to ride in the express car on such trains, and if the conductor of such train knew that that was the company's rule, and that to ride in such express car was accompanied by greater danger than other portions of

such train, then it becomes the duty of such conductor to look out for and prevent the riding of passengers in such express cars, if he has knowledge thereof; and if he is cognizant thereof and permits passengers to thus ride in such express cars without taking any steps to prevent them, then the defendant company, through such conductor or its agent, is guilty of negligence in not taking the necessary steps to prevent its passengers from riding in such dangerous portions of its train, and is liable for any damages that may result to such passenger from a collision of such train with another of its trains while such passenger is thus riding."

Of the first of these instructions it is sufficient to say, as can safely be done, that its effect is to reject and entirely ignore the company's rule and the plaintiff's violation of it as constituting any defense to his action.

The second charge makes the obligation upon passengers and the protection to a company of a rule of this kind, even when it is known to the passenger, dependent upon the fidelity of the conductor where he knows that it is being violated; and under such instruction, the rule can be of no protection to the company unless, to say the very least, there is some effort on the part of the conductor to enforce it. In this view we do not concur. Our judgment, on the contrary, is that the public welfare and sound reasoning dictate that it should be held contributory negligence for a passenger to violate a known rule of this character, even with the permission, connivance, or knowledge of the conductor, or without his protestation, where that officer is cognizant of both the rule and its infraction, if by the violation of such rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart and offering space for his accommodation. Whether there may be an exception to this view in cases of persons of tender years, or other disqualifying characteristics, is not for us to say; the point is not before us. The plaintiff was at the time of the accident not only twenty years of age, but also had been an express messenger, on the defendant company's road, long enough to render him familiar with the increased danger of riding in an express car next to the engine, over that incident to traveling in a passenger coach in the rear part of the train.

Of course, as between the company and the conductor, it is the duty of the latter, as it is of any other agent, to enforce

the rules of the company, but when a passenger voluntarily violates a reasonable rule, like that under consideration, which is for his preservation from harm, and brings upon himself injury which he would not otherwise have received, he not only cannot find relief from the consequences of his own negligence in the omission of the conductor to do his whole duty, but besides this, where, knowing of such a rule, he goes from the passenger car into a place like that in question, which cannot be regarded as intended for passengers, but naturally suggests that it is not for them, the burden is upon him to prove that he was justified in going there.

II. Though where the passenger suing knew at the time of the accident that there was a rule of this kind in force, he cannot invoke the mere delinquency of a conductor in enforcing the rule, still it cannot be denied that there may be cases in which the conduct of the company has been such as to amount to an abandonment of the rule, or to preclude itself from claiming protection under it.

In *Houston etc. R'y Co. v. Moore*, it is conceded, as shown above, that it may be true that where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding a regulation to the contrary, it will incur the same responsibility to such passengers as if they were on a regular passenger car.

In *Jones v. Chicago etc. R'y Co.*, 43 Minn. 279, a case in which it was held that the presence of the plaintiff in the baggage part of the combination car was not, under the circumstances of the case or nature of the injury, contributory to his receiving the injury, there was evidence that passengers used the baggage compartment as a smoking-room, and the jury found specially that the rule forbidding passengers to be there was not in force; and it was said by the Minnesota court that this finding, read in connection with the evidence, must mean that the rule posted up was not enforced, but was disregarded by the defendant and its servants; and that this being so, it was immaterial that the plaintiff had or had not notice that such a rule had been posted up. There was evidence that the rule had been posted up in the car, but it did not appear that the plaintiff saw or knew the rule. It was also previously observed that even though there was such a rule posted up, if it was not enforced, if the defendant, through its servants in charge, habitually disregarded the rule and permitted passengers to ride in the baggage compartment, so

that the passenger might assume the rule to have become obsolete, it certainly could not treat the passenger as a wrongdoer from passing through the baggage compartment to reach the passenger division of the car on boarding the same.

The facts in *Waterbury v. New York etc. R. R. Co.*, 21 Blatchf. 314, were that there was no express contract creating the relation of passenger and carrier between plaintiff and defendant, but on various prior occasions the plaintiff and other drovers, whose cattle were being transported between designated points, had been permitted by the employees of the railroad company to accompany their cattle by the same train, sometimes riding on the cars of the cattle train, and sometimes on the engine. At times the trains were delayed between these points, and the cattle required attention, and as no employee of the defendant was assigned to looking after the cattle it seemed to be assumed between the employees of the defendant and the drovers that the latter should look after their own cattle. Upon the occasion of the accident, the plaintiff and another drover got upon the engine, there being only box cars on the train, and the engineer inquired of them if they had cattle on the train, and being informed that such was the fact, he made no objection to their riding on the engine. The engine ran off the track in consequence of a misplaced switch, and plaintiff was injured. A rule of the company forbade its employees from permitting any person to ride on the engine. The conclusion of the court in this case was that the plaintiff was not entitled to be carried as a passenger as an implied condition of the contract to carry the cattle, but the most that could be claimed was that he was riding on the engine permissively. That the real question in the case was whether he was being carried on the engine with the consent of the defendant, or only by the unauthorized permission or invitation of the defendant's employees. That it should have been left to the jury to determine, as a question of fact, whether the defendant had by its conduct held out its employees to the plaintiff as authorized, under the circumstances, to consent to his being carried on the train with his cattle. That in this case, where the company may have derived some benefit from the presence of drovers upon its cattle trains, and may have allowed its employees in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown; and it should have been left to the jury to determine,

as a question of fact, whether, notwithstanding its rules for the government of its employees, the defendant had not held them out as having authority to consent to his being carried; and that if it should appear that its employees had been accustomed to allow drovers to accompany their cattle on the cattle trains so generally and constantly that the officers of the company must have known it, the consent of the company might be predicated upon acquiescence and ratification.

In the case before us, the evidence as to the enforcement of the rule was as follows: Hirst said: "The express car is not the place where passengers usually ride. . . . It is not a place where passengers usually ride, but it is a common occurrence for passengers to go into the express car to ride and talk with the agent. . . . Yes, I knew the company claimed to have a rule that passengers should not ride anywhere but in the passenger cars, but it was never carried out; it was a frequent and common occurrence for friends of the express messenger to come into the express car and sit there and talk with the messenger, and passengers frequently went into the express car and sat around on the baggage and boxes in there and smoked, and it was never objected to by the conductor." And the conductor, Gamble, testified: "It was against the rules of the company for passengers to ride on the express car, and Hirst knew it. . . . Passengers frequently sit in the express car, and talk and smoke."

If the trial judge had, upon the basis of this testimony, submitted to the jury the question whether or not the defendant company had by its conduct held out to the plaintiff, its employees in control of the train as authorized, notwithstanding its rule, to consent to his riding in the express car; or whether its employees had been accustomed to allow passengers to ride in the express car so generally and constantly that the officers of the company must have known it and have acquiesced in the violation; or the question of there having been such continued and habitual disregard of the rule by the employees as must have reasonably produced the belief that the company had practically abandoned its rule, there would still be a question as to the testimony being sufficient to sustain a finding against the company on such theory or theories. Certainly, where, as here, a passenger knows of the existence of such a rule he cannot rely upon any mere delinquency of the conductor or other agent charged with its enforcement; but, on the contrary, there must be something

which establishes the concurrence of the company in the disregard of the regulation. There has, however, not been even a submission to the jury of any such question, but the judge gave the case to the jury upon the theory that the virtue of the rule was dependent solely upon the fidelity of the conductor; and in this, as shown above, there was error.

III. In what is said above, we have not lost sight of the fact that when the defendant has inflicted the injury intentionally, or when he has done so unintentionally, yet his conduct, though still within the domain of negligence, has been wanton or reckless of its injurious consequences, or, in other words, he has been guilty of what is now called, it may be inaptly, "willful negligence," the contributory negligence of the plaintiff is not a defense: Beach on Contributory Negligence, 2d ed., secs. 61-64; Cooley on Torts, 2d ed., 810; *Palmer v. Chicago etc. R. R. Co.*, 112 Ind. 250; *Brannen v. Kokomo etc. Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411; *Banks v. Highland Street R'y Co.*, 136 Mass. 485; *Donahoe v. Wabash etc. R'y Co.*, 83 Mo. 543; *Gothard v. Alabama etc. R. R. Co.*, 67 Ala. 114; *Peoria etc. R. R. Co. v. Lane*, 83 Ill. 448. Though such wanton or reckless conduct has sometimes been spoken of as "gross negligence," the term does not define it, nor is gross negligence confined to only such an extreme degree of negligence: Beach on Contributory Negligence, secs. 61, 62; *Milwaukee etc. R'y Co. v. Arms*, 91 U. S. 489; *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169; and we are entirely satisfied that the term "gross negligence" was not used by the circuit judge in his charge in any such extreme sense, for had it been he would not have recognized contributory negligence as a defense, as he has done in charges not necessary to be set out here. Not only was the case not submitted to the jury for consideration by it in this light, but the facts are not such as would authorize an appellate court to say, as a matter of law, that it was one in which the defense of contributory negligence cannot have a standing: *Brannen v. Kokomo etc. Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411; and to treat as harmless the errors pointed out above, and affirm the judgment.

IV. Exemplary damages can be allowed in cases of negligence, as distinguished from those of intentional injury, only where, as was said in *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394, 419-421, and the authorities there cited, the negligence is of a gross and flagrant character, evincing reckless

disregard of human life, or of the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. This being the rule, and the term "gross negligence" not being confined to this extreme degree of negligence, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages. It leaves the jury to its own ideas, whatever they may be, as to what want of care constitutes the gross negligence authorizing the allowance of such damages. The character of negligence should, instead of using the term "gross negligence," be defined as indicated above, in order that the jury may understand in what cases such damages may be given or inflicted: *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169.

V. The testimony does not justify us in concluding that Hirst was attempting, as claimed by counsel for appellant, to obtain a ride without paying fare, and to this end was practicing a fraud or imposition on the conductor or the company by passing himself off as express messenger returning to his "run." It is true there is testimony that up to six weeks before the day of the accident he had been an express messenger and had run on the same train with the conductor who was in charge of the colliding passenger train, but there is also testimony to the effect that he had left this employment, and at the time of the accident was engaged in other business at Tampa, and that on boarding the train he went into the passenger car, and that he had funds sufficient to pay his fare. The evidence, moreover, justified the jury in concluding that the conductor was aware of all this. The conductor did not ask him for his fare, and gives as a reason for not doing so that he thought Hirst was in the employ of the express company. There was, however, nothing in the conduct of Hirst to throw upon him any blame for this omission of the conductor.

Under this evidence we cannot conclude that Hirst's presence or his purposes on the train were fraudulent, or that he at no time had the legal status of a passenger thereon. The actual payment of fare is not indispensable to such status: *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336;

Pennsylvania R. R. Co. v. Books, 57 Pa. St. 339; 98 Am. Dec. 229; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Steamboat New World v. King*, 16 How. 469; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62; 37 Am. Rep. 423; *Toledo etc. R'y Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613; *Toledo etc. R'y Co. v. Brooks*, 81 Ill. 245.

The case is, of course, not one which involves the measure of the duty of a railroad company to an express messenger, or other employee of an express company, traveling in an express car and injured while in the due performance of his ordinary functions, through the negligence of the company or its agents.

There are other assignments of error, but they need not be noticed. What has been said above seems sufficient for future proceedings in the cause.

For the reasons indicated above, the judgment must be reversed, and it will be so ordered.

CONTRIBUTORY NEGLIGENCE — WHEN NOT A SUFFICIENT DEFENSE. — See note to *Harris v. Clinton Tp.*, 8 Am. St. Rep. 850. If from the evidence it cannot be made clear that the plaintiff was free from negligence, a recovery can be had only upon a showing of willful wrong by the defendant: *Brannen v. Kokomo etc. Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and note with cases collected; see also *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28.

EXEMPLARY DAMAGES — WHEN ALLOWED IN ACTIONS FOR NEGLIGENCE. — Exemplary damages may be awarded in an action against a railroad company for personal injuries, if the negligence was of such a degree and character as to evince a gross carelessness or disregard for public safety: *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144; 30 Am. St. Rep. 41, and note; *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65. For extended discussions of the allowance of exemplary damages, see notes to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870; *Austin v. Wilson*, 50 Am. Dec. 767, *Merrills v. Tariff Mfg. Co.*, 27 Am. Dec. 685.

RAILROADS — DUTY OF PASSENGERS TO RIDE IN CARS SET APART FOR THEM. — One who takes an exposed position upon a train not designed for the use of passengers assumes the special risks of that position whether he takes it by license, non-interference, or special permission of the conductor: *Files v. Boston etc. R. R. Co.*, 149 Mass. 204; 14 Am. St. Rep. 411, and note. One riding in a baggage car by permission of the conductor, in violation of the rules of the company posted in such car, and in consequence of riding there is injured, cannot recover from the company on the ground of its negligence: *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; 37 Am. Rep. 651. The same rule applies to riding on mail cars: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585, and note; but if the passenger had no notice of the rules, express or implied, the company would be

liable: *McVeety v. St. Paul etc. R'y Co.*, 45 Minn. 268; 22 Am. St. Rep. 728, and note.

RAILROADS — LIABILITY FOR INJURIES TO PASSENGERS — MISCONDUCT OF SERVANTS. — Though a railroad car is not operated for the purpose of carrying passengers, yet if a person takes passage therein by the invitation of the servants in charge thereof, they are bound to operate the train in such a manner as due care and caution would suggest for his safety: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note; *Dunn v. Grand Trunk R'y*, 58 Me. 187; 4 Am. Rep. 267; *Hanson v. Mansfield R'y etc. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162; note to *Little Rock etc. R'y v. Miles*, 48 Am. Rep. 15.

EX PARTE THEISEN.

[30 FLORIDA, 529.]

MUNICIPAL CORPORATIONS — ARBITRARY DISCRIMINATIONS. — A grant of power to municipal corporations to regulate and restrain liquor dealing does not authorize the enactment of an ordinance under which arbitrary discriminations may be made in respect to matters which are exclusively under statutory control and regulation.

MUNICIPAL CORPORATION — ARBITRARY DISCRIMINATION BY ORDINANCE. — When the personal fitness of an applicant for a license to retail liquor in any place, whether within the limits of a municipal corporation or in the interior of a county, is regulated by state law, municipal authorities have no right by ordinance to arbitrarily discriminate between persons to any extent, based solely on account of personal fitness.

MUNICIPAL CORPORATIONS — ORDINANCE PERMITTING ARBITRARY DISCRIMINATION. — When the personal fitness of an applicant for a license to retail liquor in any place is regulated by state law, a municipal ordinance providing that no liquor license shall be used within four hundred and fifty feet of any school or church established at the time such license is granted, without the consent of the municipal council, is void for permitting such council to arbitrarily discriminate between persons as to personal fitness to engage in the retail liquor business.

J. E. Wolfe and John Eagan, for the petitioner.

W. A. Blount, for the respondent.

MABRY, J. The petition of C. Theisen, filed in this court on the third day of November, A. D. 1892, alleges that he is detained and held in custody by Joseph Wilkins, sheriff of Escambia County, Florida, and *ex officio* marshal of the provisional municipality of Pensacola, under judgment and sentence pronounced against him on the first day of November, A. D. 1892, by the president of said provisional municipality, and judge presiding in said municipal court, on a charge of violating an ordinance of said municipality. The detention is alleged to be unjust and contrary to law, and the grounds

stated in the petition for this allegation are as follows, viz.: That petitioner obtained from the collector of revenue of said county a state and county license as a liquor dealer for election precinct number 12 in said Escambia County, for the year commencing October 1, A. D. 1892, and ending September 30, A. D. 1893; that prior to obtaining said license he complied in all respects with the laws of the state of Florida in reference to securing a permit from the board of county commissioners of said county for said license; that said election precinct number 12 in said county is within the corporate limits of the provisional municipality of Pensacola, and petitioner, at the same time that he obtained said state and county license, also obtained a license as liquor dealer for the same period of time from the collector of revenue of said municipality; that after obtaining said licenses, petitioner proceeded to carry on his business as a retail liquor dealer in said precinct 12, within the limits of said provisional municipality of Pensacola, when he was arrested, tried, and adjudged to pay a fine of ten dollars, and to remain in the custody of the said sheriff and *ex officio* marshal until said fine was paid; that petitioner was arrested, tried, adjudged guilty, and is now deprived of his liberty by said municipal court on a charge of violating an ordinance of said provisional municipality, passed on the twelfth day of September, A. D. 1892, entitled "An ordinance relating to license taxes," and which is as follows, viz.:—

"Be it ordained that the following sections shall be added to article three, chapter fifteen, of the code of ordinances of this municipality:—

"Section 5. That every license shall state the actual location, by street and number, at which it shall be used; and if it be a license for the sale of malt or alcoholic drinks, that the location shall not be changed without the consent of the board of commissioners, nor shall any license for sale of malt or alcoholic drinks be used within four hundred and fifty feet of any school or church, established at the time license is issued, without the consent of this board.

"Section 6. That no license shall be transferred without the approval of the chairman of the finance committee, countersigned by the president of the board."

Petitioner admits that his place of business as liquor dealer was within the limits of 450 feet of an established church in said provisional municipality at the time his said licenses were granted, and that he did not have the consent of the board of

commissioners of said municipality to use said licenses within said limits as required by said ordinance; but it is alleged that said ordinance is not valid, for the reason that said provisional municipality of Pensacola has no power or authority under its charter to pass or enforce such an ordinance, and that it is in conflict with the laws of the state of Florida regulating the business of liquor dealers, and in other respects is invalid.

The sheriff and *ex officio* marshal, in answer to the writ of *habeas corpus*, states that he detains the petitioner under a commitment from the court of the president of the provisional municipality of Pensacola, issued upon a sentence by said court that said petitioner pay a fine of ten dollars, or stand committed, and that he has not paid said fine. It is also stated in the return that the proceedings against the petitioned, upon which said commitment was issued, was upon an affidavit based upon a duly ordered ordinance of the said municipality, copies of the affidavit and ordinance being attached to the return as part thereof. The ordinance is the same as that set out in the foregoing petition, and the affidavit charges that petitioner, on the twenty-fifth day of October, A. D. 1892, within the corporate limits of the provisional municipality of Pensacola, said county and State, "being then and there licensed to sell malt and alcoholic drinks, used, without the consent of the board of commissioners of the said municipality, the said license by selling malt and alcoholic drinks within 450 feet of a church which had been established before, and was established at the time the said license was issued, in violation of the ordinance of the said provisional municipality, in such case made and provided."

The petitioner, by his counsel, moves the court for a discharge from custody for the reason that the return of the sheriff and *ex officio* marshal sets up no sufficient or valid grounds for the detention of said petitioner.

The validity of the ordinance in question is involved in this case. It is contended for petitioner, in the first place, that the provisional municipality of Pensacola has no power or authority to pass such an ordinance; secondly, that said ordinance is in conflict with the laws of the state on the subject of regulating the business of liquor dealers; and thirdly, that said ordinance, upon its face, is unjust, oppressive, unreasonable, and permits of unlawful discrimination at the uncontrolled discretion of the board of city commissioners. Con-

ceding that the provisional municipality of Pensacola has the authority to pass an ordinance that no licensed retail liquor dealer shall sell liquors within 450 feet of any established school or church, and that such an ordinance would not be in conflict with the laws of the state providing the manner of obtaining a license to carry on such business, still can it pass an ordinance like the one before us, that no license for the sale of malt or alcoholic drinks shall be used within 450 feet of any church or school established at the time of the issuance of the license, without the consent of the board of commissioners of said municipality? Several cases are cited by counsel for petitioner wherein city ordinances that undertook to prohibit dairies, markets, laundries, and the use of steam-engines without the consent of municipal councils have been declared void on the ground that they were not general in their operation and permitted unjust discrimination in violation of equal rights. The case of *State v. Mahner*, 43 La. Ann. 496, declared void an ordinance on the subject of dairies, making it a penalty for persons to keep more than two cows within certain prohibited limits without the permission of the city council. The court said: "There are no conditions prescribed upon which the permit may be granted. It is within the power of the city council to grant the privilege to some, to deny it to others. The discretion vested in the council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented." The attempted enforcement of an ordinance of the city of San Francisco to the effect that no person should carry on a laundry within the corporate limits of said city and the county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone, gave rise to much discussion, and the supreme court of the United States in the cases of *Yick Wo v. Hopkins* and *Wo Lee v. Hopkins*, 118 U. S. 356, pronounced said ordinance void. Under it the city authorities, it was said in effect, could exercise arbitrary power without regard to the competency of the persons applying, or the propriety of the place selected for the carrying on of the business, and also it permitted of arbitrary and unjust discriminations founded on race differences between persons otherwise in similar circumstances.

In considering the effect of the municipal ordinances of the city of Jacksonville in reference to markets, this court said in *City of Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. Rep. 558, that "the grant as to vending meats, *et cetera*, is one of police power, and it is to be exercised upon considerations referable to the public health or welfare of the community, and not arbitrarily, nor to create a monopoly in one or several persons, nor to prohibit the trades to which it applies. Though under it the hours of the day, the places, and the mode and manner of and rules for conducting the business may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonably ample facilities for all who may desire to engage in vending such articles, the sales may be confined to specific places, yet all this must be done on principles of impartial and general regulation affording the same rights to all alike upon the same conditions, and not in the exercise of a partial and discretionary or arbitrary will of the law-making power, or of any part of it." *Vide also Mayor etc. v. Radecke*, 49 Md. 217; 33 Am. Rep. 239; Tiedeman's Limitations of Police Power, secs. 86, 102, 103.

Counsel for respondent concedes that the consent clause in the ordinance before us confers upon the board of commissioners the power to discriminate between different individuals, but he insists that this does not invalidate the ordinance. He does not, as we understand, maintain that the municipality of Pensacola can, under its powers, enact such an ordinance in reference to the ordinary vocations of life which a man has an inherent right to pursue, such as keeping a market, a dairy, or conducting a laundry, and the like, but that it does have the power to pass such an ordinance in reference to the business of retail liquor-dealing as a part of the police power of the state delegated to it. This proposition, it is evident, contains two essential elements, both of which are necessary to its maintenance. The first is, that the legislative power of the state over the subject of retailing intoxicating liquors extends far enough to authorize an arbitrary discrimination between individuals similarly situated who apply for permission to sell; and the second is, that the legislature has conferred such power upon the provisional municipality of Pensacola. If we were to concede, under the authorities cited by counsel for respondent, *Trageser v. Gray*, 73 Md. 250; 25 Am. St. Rep. 587;

Ex parte Christensen, 85 Cal. 208; *Williams v. Walker*, 107 N. C. 334; *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86, that the first element of the proposition is maintainable, this would not be sufficient to sustain the ordinance in question unless the second one is also correct to its fullest extent.

It is not contended that there is any special grant of power to the provisional municipality of Pensacola outside of the general powers conferred on municipalities contained in the general act for the incorporation of cities and towns. The power, it is claimed, is found in section 696 of the Revised Statutes, which provides that "the city or town council shall have power to regulate and restrain all tippling, bar-rooms, and all places where beer, wine, or spirituous liquor of any kind is sold at retail, or to be drank upon the premises where sold," and "to require all such places to be kept and used subject to such reasonable regulations as the council may prescribe." The petitioner has received his licenses to retail, and has complied with the law in reference to obtaining the permit of the board of county commissioners for this purpose. The statutory regulation in reference to obtaining the permit to retail is found in sections 865, 866, and 867 of the Revised Statutes. No question arises here under article 19 of the constitution of 1885, or the statutes passed in pursuance thereof, as it does not appear that any election has been held in Escambia County thereunder. The sections of the Revised Statutes above referred to—section 696, granting to cities and towns the right to regulate and restrain bar-rooms and places where liquors are retailed, and the other sections, from 865 to 868 inclusive, providing the manner of obtaining a permit and license to retail liquors—must, if possible, be construed in harmony with each other. The latter sections provide that any person desiring to retail liquors, wines, or beer in any election district in any county in this state shall make application to the board of county commissioners of the county for a permit to sell the same, and this application must be signed by a majority of the registered voters of said district, as shown by the registration list at the date of application. There are other requirements, not necessary to mention here, such as witnessing the signatures of the signers, affidavit of the applicant, and publication of the application. These sections provide a test as to the personal fitness of the applicant to engage in the business of retail liquor-selling in counties and districts

where the right to sell has not been denied by vote under the local-option provisions in sections 857 to 864: *State v. Brown*, 19 Fla. 563; *State v. County Commissioners*, 22 Fla. 1; *Butler v. State*, 25 Fla. 347. The constitution has, by article 19, provided a way by election for absolute prohibition, and the legislature has provided for the election under this article: Rev. Stats., secs. 857-864. It not appearing that any election has been held in Escambia County on the subject of retailing liquors, there is no absolute prohibition therein under the local-option provisions of the statute.

The petition statute, however, is in force, and a compliance with its requirements entitles the applicant to sell under state regulation. It is not questioned here, and there can be no doubt, that its provisions apply to election districts within the limits of municipal corporations as well as to districts in the interior of counties. We then have a constitutional provision to prohibit absolutely by vote, and also a statutory regulation as to the personal fitness of an applicant to engage in the business where no negative vote has been had, and these provisions applying to retailing within the limits of municipal corporations. We have no doubt that a retailer who has entitled himself to engage in the business under state regulation within the limits of a municipal corporation is also subject to such reasonable regulations and restraints as the municipal authorities may, in a proper way, impose, but such municipal regulation and restraint cannot go to the extent of arbitrary discrimination, as to locality in the district, between persons who have been recommended under the statute as suitable persons to engage in the business. To permit municipal regulation to this extent would be a denial of the right secured under the statute as to personal fitness to engage in the business of retailing liquors.

Conceding that the municipal authorities can, in the rightful exercise of police power, prohibit *in toto* the use of a license obtained under state regulation within 450 feet of a school or church, still, to permit some to use such a license within said limits and deny it to others, at the discretion of the board of commissioners of said municipality, would be the exercise of arbitrary discrimination between persons who had been recommended, as provided by law, as suitable persons to engage in such a business. If a municipal corporation can ever exercise such a power as this, even in reference to retailing liquor, it must be clearly and unmistakably granted. We

do not think such power can be claimed for municipal bodies under section 696 of the Revised Statutes, especially when construed in connection with state regulation on the subject of retailing liquor.

The authorities cited by counsel for respondent to sustain the power of the commissioners of the municipality of Pensacola to require their consent to retail within the prohibited limits are *Ex parte Christensen*, 85 Cal. 208; *Crowley v. Christensen*, 137 U. S. 86, and *Perry v. Salt Lake City*, 25 Pac. Rep. 739 (Utah), Jan. 30, 1891. The ordinance called in question in the first case provided that "no license as a retail liquor dealer, or as a grocer and retail liquor dealer, shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on."

The objection raised to this ordinance was that it makes the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the twelve property-owners in the second. This objection was overruled, and the court said: "Whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. . . . And if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." This ordinance was sustained by the supreme court of the United States in the case of *Crowley v. Christensen*, 137 U. S. 86. As is stated in the last case, the constitution of California provides that "any county, city or town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general law." To the same effect in principle is the case of *Trageser v. Gray*, 73 Md. 250; 25 Am. St. Rep. 587. Neither of the above cases

discloses that there was any state regulation on the subject of retailing, and hence the decisions were made on conditions that do not exist in the case before us.

In the case of *Perry v. Salt Lake City*, 25 Pac. Rep. 739, the supreme court of Utah held that the grant of power to city councils to license, regulate, and tax whisky selling conferred a wide but not an arbitrary discretion as to persons applying for license to sell, as to places where sales are to be made, and as to the number of licenses to be granted, and that such discretion may be exercised in respect to each individual case when application is made, if the matter has not been regulated by ordinance. The statute under which this decision was made gave to city councils power to license, regulate, and tax the sales of intoxicating liquors, and determine the amount to be paid for such license; but it was provided that such license should not extend beyond the municipal year in which it may be granted, and that said councils shall require of all applicants a bond with like conditions as required by the general laws of the territory in that respect. Further provision was made in the statute that counties in which cities are situated shall not require any additional license to that issued by a city. Another section in the criminal code prohibited the selling of intoxicating liquors to any person at certain places. It was said by the court expressly in the above case that "the power to license, regulate, and tax the sale or disposition of intoxicating liquors within its limits is possessed by Salt Lake City, except so far as it is regulated by the above provisions." The statute referred to did not undertake to regulate in a different way the matters upon which the city council in the case before the court acted.

Our decision in the case at bar rests upon the conclusion that the grant to municipal corporations to regulate and restrain will not permit the enactment of an ordinance under which arbitrary discrimination may be made in respect to matters which are exclusively under statutory control and regulation. In the absence of an express declaration of intention to that effect, it must not be assumed that the legislature proposed by the grant of power to municipal corporations to regulate and restrain retail liquor dealing, to confer upon them the power to contravene and defeat state policy by ordinances inconsistent with the laws of the state on the subject. The personal fitness of an applicant to retail in any place, whether within the limits of a municipal corporation or in the

interior of a county, is regulated by state law, and we think that municipal authorities have no right to arbitrarily discriminate between individuals to any extent, based solely on account of personal fitness. It is evident that the ordinance in question permits of such discrimination, and for this reason we think it is void: 1 Dillon on Municipal Corporations, 4th ed., sec. 329; *City of Canton v. Nist*, 9 Ohio St. 439; *Thompson v. City of Mount Vernon*, 11 Ohio St. 688; *Mayor etc. v. Thorne*, 7 Paige, 261; *Smith v. Mayor etc.*, 3 Head, 245; *Robinson v. Mayor etc.*, 1 Humph. 156; 34 Am. Dec. 625; *Foster v. Brown*, 55 Iowa, 686; *Town of New Hampton v. Conroy*, 56 Iowa, 498; *State v. Ferguson*, 33 N. H. 424; *Ex parte Levy*, 43 Ark. 42; 51 Am. Rep. 550.

The mere fact that provision is made by state regulation for securing the license to sell does not in our judgment exclude all municipal regulation or restraint of such business within corporate limits, but to what extent such regulation or restraint can go it is not necessary to say, as the ordinance in question is void because it permits of arbitrary discrimination in reference to matters which are now exclusively under statutory regulation, and which have not been delegated to municipal bodies.

The other questions discussed are not decided, inasmuch as the rightful detention of petitioner depends upon the validity of the ordinance set up in the petition. This being void for the reasons assigned, no other matters become essential to the disposition of the case. The motion must be sustained and the petitioner discharged, and it is ordered accordingly.

MUNICIPAL CORPORATIONS — ORDINANCES — SALE OF INTOXICATING LIQUORS. — A city may impose a heavier penalty for selling liquor in violation of its ordinances regulating such sale than the penalty provided by the general laws of the state prohibiting the sale of such liquor in a less quantity than a gallon: *City of Pekin v. Smetzel*, 21 Ill. 464; 74 Am. Dec. 105, and note; but a by-law prohibiting the sale of liquor by persons within the limits of a town, when by a general law the sale of liquors is licensed, is in conflict with the latter and void: *Robinson v. Mayor*, 1 Humph. 156; 34 Am. Dec. 625, and extended note discussing the restrictions placed upon the passage of ordinances by municipal corporations. See note to *State v. Clark*, 61 Am. Dec. 614, on the power of municipal corporations to regulate the sale of liquors; also, note to *Commonwealth v. Kimball*, 35 Am. Dec. 336

STATE v. SAXON.

[30 FLORIDA, 668.]

ELECTIONS — CONSTRUCTION OF STATUTES. — Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result as shown by the ballots deposited by legal electors must not be set aside except for causes plainly within the purview of the statute.

ELECTIONS — POWER TO REGULATE BY STATUTE. — It is within the power of the legislature to make reasonable regulations as to ballots, to the end of preserving the purity of elections and the independence of voters; and the legislature may also declare a rule of evidence by which fraud in a particular case shall be conclusively established without inquiring into the fact whether it does or does not exist.

ELECTIONS — STATUTE WHEN MANDATORY. — When a statute distinctly declares that ballots having a distinguishing mark upon them shall not be received, or shall be rejected, it is to be construed as mandatory and not as directory.

ELECTIONS — BALLOTS — CONSTRUCTION OF STATUTE. — A statute providing that a ballot shall be of plain white paper, clean and even cut, without ornament, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons to be voted for, and the office to which such person or persons are intended to be chosen, the word "designation" is to be construed to intend only designations in the nature of ornaments, mutilations, symbols, or marks, as distinguished from words and writing; and ballots containing the words "National Republican ticket" and "Free Suffrage ticket" on the inside and body of the ballot are not illegal, nor within the condemnation of the statute.

William B. Lamar, attorney-general, Wall and Wall, and Shackleford and Palmer, for the plaintiff.

R. W. Williams and T. P. Lloyd, for the defendant.

RANEY, C. J. Referring to the defendant's answer as amended, it appears that he claims to have received 303 votes, and that the relator received 297, although the original official canvass returned the vote as 290 for defendant and 297 for relator.

The point to be decided is that of the legality or illegality of at least nine, if not eleven, ballots which were thrown out by the inspectors at precinct 5 in their canvass. The objection to the ballots is that they have on their face, or the side on which are the names of the persons and offices, the words "National Republican ticket," and "Free Suffrage ticket," the former intervening the words "For Electors of President and Vice-

President" (the initial words of the ticket) and the names of the candidates for these offices, and the letters or words "Free Suffrage ticket" being about the middle of the ballot and intervening the names of the candidates for justices of the supreme court and the words "For Senator from the Ninth Senatorial District, A. S. Mann." The offices preceding the expression "Free Suffrage ticket" are electors of President and Vice-President, representative in the fifty-first Congress, and state officers, whereas, those following it are senator from the district indicated, and member of the House of Representatives from the county, and the county officers.

The objection to these ballots is based upon the twenty-third section of the general election law of June 7, 1887, chapter 3704 of the statutes, which section is as follows: "The voting shall be by ballot, which ballot shall be plain white paper, clear and even cut, without ornaments, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon in black ink or with black pencil, and such ballot shall be so folded as to conceal the name or names thereon, and, so folded, shall be deposited in a box to be constructed, kept, and disposed of as hereinafter provided, and no ballot of any other description found in any election box shall be counted."

A consideration of adjudications in other states on statutes of the same general character, and of other authorities, will aid us in reaching a correct understanding of the statute of 1887, and in solving the question as to whether or not the ballots in controversy fall under its condemnation.

In *Commonwealth v. Woelper et al.*, 3 Serg. & R. 29, 8 Am. Dec. 628, a by-law of a Lutheran congregation, incorporated, provided that if, "besides the names, there are other things upon the tickets," they should not be counted, and tickets cast in favor of certain persons for vestrymen had an engraving of an eagle on them; and they were held to be illegal, the reason given by one of the judges being that the eagle might be seen by the inspectors even when the ballot was folded, and that it deprived voters who did not vote such tickets of the secrecy which the ballot was intended to secure.

The provision of an Indiana act of 1867 is, that all ballots shall be "written or printed on plain white paper, without any

distinguishing marks or other embellishments thereon except the names of the candidates and the office for which they are voted, and inspectors of election shall refuse all ballots offered of any other description; provided that nothing herein shall disqualify the voter from writing his name on the back thereof." In *Druliner v. State*, 29 Ind. 308, ninety-eight ballots were cast for Weaver and forty-six for Druliner, and they were all printed on plain white paper; and with the exception that the words "City Union ticket" were printed on the face or inside of those cast for Weaver, there was nothing printed or written on any of them except the names of the candidates and the offices. It was held that the act was intended to protect the elector from undue influence and control by others, and to secure to him entire freedom of opinion in the exercise of the elective franchise, by enabling him to cast his vote in such a manner as would prevent others who from their peculiar relations to him might, by intimidation or otherwise, seek to control his vote, from being able to determine from the color of his ticket or some distinguishing mark thereon the party or person for whom he voted; and that this purpose would seem to be secured, as far as legislative enactment could effect it, by requiring all ballots cast to be uniform in external appearance, and that therefore the act could not be construed to prohibit a distinguishing mark on the inside of the ballot.

This conclusion was aided, as appears in the reasoning of the court, by the fact that the act did not (particularly when considered in connection with statutory provisions requiring that ballots when presented should be put "unopened" into the ballot-box and not be opened or marked by the inspectors by "folding or otherwise") authorize the inspectors and judges to reject a ballot upon the discovery of such a mark or embellishment at the time of counting out the ballots as could not be seen by the inspector at the time the ballot was voted.

The same conclusion was reached in *Stanley v. Manly*, 35 Ind. 275, and *Millholland v. Bryant*, 39 Ind. 363, where the words "Republican ticket," or "Republican county ticket," or "Republican township ticket," were printed at the head and on the inside of the ballot.

In *State v. Adams*, 65 Ind. 393, the information showed that the relator received 12,851 votes and the defendant 12,899, and that the ballots cast for relator were headed on the inside "Democratic ticket" and "National ticket," and those voted for defendant "Republican ticket," and that five

thousand of those cast, received, and counted for defendant were printed in such a manner that the words "Republican ticket" could be seen on the outside, and were seen by the inspectors, but that such was not the case as to the ballots cast for relator. The conclusion and reasoning of the court is embodied in the following language: "To push the meaning of the statute to the extreme of holding that the inspectors of elections shall refuse to receive ballots because the printing upon the inside, which is not unlawful, can be seen on the outside through the paper, we think would be a most unwarrantable construction of its language. The irregularity or malconduct in the inspectors in receiving such ballots cannot affect the case if the votes cast thereby are otherwise legal; for it is enacted that 'no irregularity or malconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person, unless such irregularity or malconduct was such as to cause the contestee to be declared elected when he had not received the highest number of legal votes'"; citing *Dobyns v. Weadon*, 50 Ind. 298; *Allen v. Crow*, 48 Ind. 301; *Hadley v. Gutridge*, 58 Ind. 302. In *State v. Wasson*, 99 Ind. 261, the decision was, that the requirement as to plain white paper prescribes no grade, quality, or thickness of paper nor absolute uniformity. The object of the statute, says the opinion, was undoubtedly to secure the privacy of the ballot; but if a voter uses a ballot which comes within the letter of the statute, his vote is not to be rejected because the quality or grade of the paper upon which it is printed differs from that of others which also comes within the letter of the statute, even though the difference be so perceptible as to partially destroy the privacy of the ballot.

In California, the statute (section 1191 of the Political Code) provided that no ticket should be used at any election or circulated on the day of election unless written or printed on paper furnished by the secretary of state or on paper in every respect like such paper, and is four inches in width and twelve inches in length or within an eighth of an inch of such size; and if printed, unless the names are in black ink and in long primer capitals,—the name of the office in small capitals and of the person in large capitals,—and both without spaces, except between the different words or initials in each line, and with specified margins; and if printed, the lines are straight and the matter single-leaded; and if written, no sign appears when the paper is folded; and unless it is free from every

mark, character, or device or thing that would enable any person to distinguish it by the back, or, when folded, from any other legal ticket or ballot. And section 1207 enacts that when a ballot found in any ballot-box bears upon it any impression, device, color, or thing, or is folded in any manner intended to designate or impart knowledge of the person who voted such ballot, it must with all its contents be rejected; and section 1208, that when a ballot found in any ballot-box does not conform to the requirements of section 1191, it must with all its contents be rejected.

In *Kirk v. Rhoades*, 46 Cal. 399, ballots were objected to because they were not printed in long primer capitals and the lines were double-leaded, and the conclusion of the court was that they should be counted; and the view expressed in the opinion is that a ballot should not be rejected simply because it differs from regulations prescribed in the code over which the elector had no control, such as its size, the kind of paper on which it is printed, or the character of the type or leading used in printing; that it was clear from the testimony that none but an expert with his dividers in his hands could possibly tell whether or not a given ticket complied with the requirements of the law; and to reject such tickets cast in good faith by a qualified elector would be to destroy, instead of protect, the freedom and purity of elections; that to defeat the will of the people in any election it would only be necessary to furnish the electors or a portion of them with tickets in which the printed lines were one sixty-fourth part of an inch — the difference in space occupied by double and single leaded lines — further apart than is required by the code. There are, however, says the opinion, other requirements of the code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected; he can see, for instance, that his ballot is “free from every mark, character, device, or thing that would enable any one to distinguish it by the back”; and if, in willful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote. In *Wyman v. Lemon*, 51 Cal. 273, it was held that if an elector uses ink to scratch names from his ballot, and by that means the ballot becomes discolored, such discoloration is not a **mark** designed to distinguish the ballot from other legal ballots, and will not authorize its rejection.

In *Coffey v. Edmonds*, 58 Cal. 521, a ballot had the words

"For President, Hancock and English," written in pencil upon its face under the words at the top of the names Eleventh Senatorial District. It had also on its face "For judge of the superior court, M. A. Edmonds," and was counted for Edmonds, the candidate of the Republican party, and it was held that the words "For President, Hancock and English," written on the ballot, did not vitiate it, and that it had no "mark or thing thereon by or from which it could be ascertained what persons or what class of persons used or voted it": Pol. Code, sec. 1197. In *Reynolds v. Snow*, 67 Cal. 497, it was, however, decided that a ballot only eight inches and a half in length was properly rejected.

In Texas a statute of 1879 enacted that all ballots shall be written or printed on plain white paper, "without any picture, sign, vignette, device, or stamp mark, except the name of the political party whose candidates are on the ticket; provided, such ballots may be written or printed on plain white foolscap, legal cap, or letter paper; provided, that all ballots containing the name of any candidate pasted over the name of any other candidate shall not be counted for such candidate whose name is so pasted, and any ticket not in conformity with the above shall not be counted in counting the votes, and no ticket not numbered as provided shall be counted."

This statute has been before the supreme court of that state several times. In *State v. Phillips*, 63 Tex. 390, 51 Am. Rep. 646, ballots sufficient in number to control the result of the election were objected to as illegal on account of their being "diamond-shaped." This was urged to be a "device," within the meaning of the act, but it was held that the word "device," as used, meant a figure, mark, or ornament of a similar character with the "pictures, signs," etc., enumerated in the same connection and placed upon the ticket in a like manner; that the decisions tend rather to restrict the exceptions which exclude a ballot than to extend them, and to admit the ballot if the spirit and intention of the law is not violated, although a literal construction would vitiate it; citing *Druliner v. State*, 29 Ind. 308; *Stanley v. Manly*, 35 Ind. 275, and *Kirk v. Rhoads*, 46 Cal. 398. In reply to the argument that the purpose of the statute was to preserve the secrecy of the ballot and the independence of the voter, and that this would be defeated by such ballots as those in question, it is observed: "If this were the case we should not feel justified in extending the provisions of the statute beyond the legal import of its terms.

. . . . The result as shown by the tickets deposited by legal electors must not be set aside except for causes plainly within the purview of the law." It is further observed in substance that if the law-making power had supposed the same evil results as to destroying the secrecy and independence of the ballot would follow from allowing tickets to be made in different shapes as from color and other prohibited features, it doubtless would have prescribed the form of tickets.

The tickets are said to be somewhat in the shape of a rhomboid, and not only are they not illegal from being of this shape, as the statute does not prescribe any shape, but they are easily folded in such a manner as to render it impossible for the closest observer to tell of what shape the paper is when spread out to its full size, and the spirit and intention of the law are not violated by their use, or the secrecy of the ballot or independence of the voter interfered with by their use.

In *Owens v. State*, 64 Tex. 500, ballots were objected to because headed "Election ticket," and others because the names of the candidates for President and Vice-President and the counties where the presidential electors resided were printed on them. The ballots were declared legal, the court holding the statute to have been intended to secure the secrecy of the ballot and to preserve the voter from undue influence or restraint in voting, and that all statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor; that by the word "device," the statute meant some figure, mark, ornament, emblem, or cipher which would distinguish the ticket from others cast at the election; that the word "device," which did not include "the residence of the candidates, for that may be stated for their better identification," nor the names of the candidates for President and Vice-President, "for they are indirectly supported by voting for the electors," and that the words "Election ticket" printed on the inside, folded as the ballots usually are, furnished no means of distinguishing the ballots from others in the box, it being a mere description of what follows and as it would be lawful under the strict letter of the statute to place the words "Republican ticket," or "Democratic ticket," on them, it could not be seen how the spirit of the law could be violated by "the mere change of one word in the heading of the ballot."

In *Williams v. State*, 69 Tex. 368, the words "Democratic ticket" were printed at the head of the ballot, followed by

the names of several candidates for state officers, while about its center were the words "People's ticket," followed by the names of the opposing or People's candidates for county offices, and it was held that the ticket came within the letter of the law allowing "the name of the political party whose candidates are on the ticket" to be placed on it.

The Mississippi statute, sec. 137, Code of 1880, is that "all ballots shall be written or printed with black ink, with a space of not less than one fifth of an inch between each name, on plain white news printing paper, not more than two and one half nor less than two and one fourth inches wide, without any device or mark by which one ticket may be known or distinguished from another except the words at the head of the tickets; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted."

In *Oglesby v. Sigman*, 58 Miss. 502, certain ballots had on their face and under the heading "Republican National ticket," a printer's line or "dash-rule" of slightly ornamental character, and at three other distinct places under a name a dash-rule, two of them being less fancy than the first mentioned, and the other being plain, and it was held that they vitiated the ballots, and that the effect of the statute was to condemn as illegal and not to be received or counted any ballot which has on its face or back any device or mark other than the names of the persons to be voted for, and "the words at the head of the ticket" by which one ticket may be distinguished from another. As to this case see, however, *Lynch v. Chalmers*, 6 Cong. Elec. Cases, 338, 6 Am. & Eng. Ency. of Law, 350, 419.

In *Steele v. Calhoun*, 61 Miss. 556, a printer's dotted line between the last office named on it and the preceding name was held to invalidate the ballot, the court affirming that it was not permitted to distinguish between the different devices or marks which may be put on ballots. In the same state certain tickets were rejected in making the count because the names of candidates for the legislature were found to be less than one fifth of an inch apart, and this action was affirmed in *Perkins v. Carraway*, 59 Miss. 222.

Section 5493 of the revised statutes of Missouri of 1879, after stating that the ballot should be a white piece of paper on which shall be written or printed the names of the persons

voted for, provides that such "ballot shall not bear upon it any device whatever, nor shall there be any writing or printing thereon except the names of persons and the designations of the offices to be filled, leaving a margin on either side of the printed matter for substituting names. Each ballot may bear a plain written or printed caption thereon expressing its political character, but on all such ballots the caption or headlines shall not in any manner be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and the same shall not be counted."

In *Shields v. McGregor*, 91 Mo. 534, a case in which the feature of headlines was involved, it is said that the statute was passed in view of the well-known fact that ballots are in general previously printed, and circulated on election day by committees of persons appointed by the respective political parties or by those who advocate the election of certain parties, and it was held that the purpose of the law was to prohibit the use of a caption calculated to induce the elector to conclude, from an inspection of the caption or headlines only, that the persons thereunder named are of his political persuasion when they, or any of them, in fact, are not; that headlines were not prohibited by the statute, but were permitted by it, yet when used they must tell the truth; that the statute fixed an absolute rule of evidence, and declares the prohibited ballots fraudulent, without regard to the fact whether they did in reality deceive the elector or not. See also *Turner v. Drake*, 71 Mo. 285. In *State v. Watson*, 9 Mo. App. 594, a ballot having the words "and collector" after "sheriff," thus "Sheriff and collector," was held to be good and counted the sheriff being also *ex officio* collector of taxes.

An Ohio statute provided for a single ballot on plain white paper without any device or mark of any description to distinguish one ticket from another, or by which one ticket may be known from another by its appearance, except the words at the head of the ticket; "and whenever any ballot, with a certain designated heading, shall contain printed thereon, in place of another, any name not found on the regular ballot having such heading, such name so found shall be regarded by the judges of election as having been placed there for the purpose of fraud, and such ballot shall not count for the name so found"; yet it was held in *Roller v. Truesdale*, 26 Ohio St. 586, that the provision quoted did not exclude from being

counted names of candidates for county officers nominated by a local party organization and printed on a ticket properly designated as a county ticket, although such ticket was printed on and made part of a ballot which contains also the names of candidates nominated by another party for state and district offices with words at the head thereof intended to distinguish it from other tickets for state and district offices, the local organization having no state and district organization or candidates, but its members adhering, some to the Democratic and others to the Republican state and district organizations.

A statute of Connecticut, enacted in 1889, provides (sec. 1) that the ballots shall be printed on plain white paper furnished by the secretary of state, as therein provided, and that "such ballots shall be of uniform size, color, quality, and thickness, for each ballot of the same class, to be determined by the secretary. In addition to the official indorsement, the ballots shall contain only the names of the candidates, the office voted for, and the political party issuing the same. The name of the party issuing the ballot, the title of the office voted for, and the name of the candidates, shall be printed straight across the face of the ballot in black ink, and in type of uniform size, to be prescribed by the secretary of the state at least sixty days before any election held under this act." And (sec. 9) " . . . if any envelope or ballot shall contain any mark or device so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted, but shall be kept by the moderator and returned to the town clerk in a separate package from the ballots which are counted at such election." And (sec. 12) that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted; *provided*, however, that any voter may alter or change his ballot by erasing any name therefrom, or by inserting in place of any name thereof, in writing or by poster, the name of any person for any office to be voted for thereon other than the person thereon named for such office."

At an election under this statute there were regular ballots provided which were prepared and issued by the Republican, the Democratic, and the Prohibition parties respectively, these parties being organized and known by the names stated, and each party placing its name at the head of the ballot issued by it. In addition to these ballots, a ballot was issued by the Republican party which had at its head the word "Citizens,"

in the place of "Republican," but was in all other respects the same as the Republican ballots mentioned above.

In *Talcott v. Philbrick*, 59 Conn. 472, it is observed, upon the part of the majority of the court: "The question relates not to the paper, but to the printing or writing thereon. Four things only are allowable — the official indorsement, the names of the candidates, the office voted for, and the name of the political party issuing the ballot. . . . Does such ballot conform to the statute? The ballot does not speak the truth. It purports to have been issued by a Citizens' party but it was in fact issued by the Republican party. It implies that there was a Citizens' party, but there was not. So if the argument that the name of the party issuing the ballot may be omitted altogether is sound, it will hardly justify a misrepresentation. . . . The clause, 'the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same,' if construed by itself, might be regarded as permissive, and not mandatory.

"What is the ballot? It consists not merely of the paper of the prescribed size and quality, but also of the required printing thereon. No part may be omitted. If the name of the party may be omitted, so may the name of the candidate or office. If either of the last two is left out, its validity as a ballot is destroyed. . . . But this clause cannot be construed by itself; it must be taken in connection with other parts of the act. The next sentence of the same section is mandatory in terms. . . . It will hardly do to say that the statute means that these three things (those stated in such 'next sentence') shall be printed, if printed at all. That is an interpolation inconsistent with the spirit and object of the act. The proviso in the twelfth section is significant. . . . No other erasure or writing is allowed. If any other writing is allowed, other provisions of the statute are rendered nugatory and meaningless." The ballots were held to be illegal (two of the five justices dissenting).

In *Fields v. Osborne*, 60 Conn. 544, a Republican caucus adjourned for the purpose of forming a Citizens' caucus. Thereupon ten or fifteen Democrats who were present, but had not participated in the proceedings, came forward and acted with the Republicans, about fifty in number, who were present, in nominating a Citizens' ticket, the candidates upon which were taken from both parties. A collection was taken for the expense of printing the tickets. No steps were taken to effect a

permanent organization of a Citizens' party, or to provide for its further existence. The Republican party issued no tickets, and no ballots were used at the election except those headed "Democratic ticket" and "Citizens' ticket." The decision was that the "Citizens' tickets" were issued by a political party within the meaning of the statute. In the same case the words "For judge of probate, Henry H. Stedman," appeared at the bottom of the Citizens' tickets in question, the selection of such officer at the election in question not being authorized, although the Citizens' caucus had made the nomination indicated by the ballot; and on the Democratic ballot after "For town clerk," an officer to be chosen at such election, the words "*an ex officio registrar of births, marriages, and deaths*" appeared. The words on the Citizens' ticket and those italicized as being on the Democratic ballots were held to avoid the ballots.

"If," says the court, "it was doubtful whether the act applied to them, if their legality depended upon a construction of the meaning or the language of the act, our duty might not be plain. If they could be held to fall within the prohibition of any mark or device contained in the ninth section, instead of within the express prohibition of the first section, then it would be our duty to inquire whether they constituted a mark or device by which the ballot might be identified in such manner as to indicate who might have cast the same. But, **no**. A plain provision of the law is violated in a point concerning which the act does not authorize us to inquire into the extent or consequences of the violation. In short, the legislature has seen fit to say that if a ballot contains the addition to its specified contents which these do, it shall be void. . . . In regard to provisions which are plain on their face, which are not dependent upon the question of good faith, or the actual or possible result of disregarding them, we can only say, as in *Talcott v. Philbrick*, 59 Conn. 472, the legislature has spoken, and obedience is our first and only duty. It is at liberty to throw around the ballot-box such safeguards and regulations as it may deem proper, and it is the duty of the citizen to conform thereto. Some inconvenience is not too great a price for an honest and pure ballot."

In the same case, *Fields v. Osborne*, 60 Conn. 544, the Democratic ballots were also objected to because the word "For" was printed on each of them before the name of every office printed on them. "If it was plain and clear," says the court,

"that the act, in limiting the contents of the ballot to the official indorsement, the names of the candidates, the name of the political party issuing the same, and the office voted for, prohibited the use of the word 'for' before the title of the office, we should be bound, upon the principles herein already recognized as sound, to declare the ballots void for that reason. But that the statute so intended is not plain and clear. On the contrary, the language is ambiguous. There is room for honest and intelligent men to differ."

Having referred to former instances in which the same word had been similarly used, and to the fact that the Republican ballots in this very case contained it, and as confirmatory that the language of the act was ambiguous, it is said: "If ambiguous, it is the proper subject of construction. In discharging the duty of construing it so that the voter shall not be deprived of his vote except upon a plain and unambiguous provision of the law, we feel bound to hold that the act does not in terms and expressly, nor by necessary construction, prohibit the use of the word 'for' before the title to the office. It follows, therefore, that neither its use nor the failure to use it necessarily and of itself invalidates a ballot. The question of illegality is remitted to the ninth section of the act. If the regular ballots issued by a political party contain the word 'for' before the title of the offices therein named, then it cannot be held to be a 'mark or device' so that the same may be identified in such manner as to indicate who might have cast the same, and therefore it is not obnoxious to that provision. If the regular ballots of a political party omit the word 'for' in the connection stated, then the use of the word on some of the ballots cast, inasmuch as it would be a mark or device by which the same might be identified, would be illegal. Each case must be governed by its own circumstances and decided as a question of fact upon the principles herein stated. Upon the facts in this case we hold that the ballots in question were not illegal and void because of the use of the word 'for.'"

These decisions all recognize, either expressly or by implication, the right of the legislature to make reasonable regulations as to ballots, to the end of preserving the purity of elections and the independence of the voter. In the Ohio case, *Roller v. Truesdale*, 26 Ohio St. 586, it is said: "The propriety of excluding from the count fraudulent votes is conceded by all. We also concede the power of the legislature

to declare a rule of evidence by which fraud in a particular case shall be conclusively established without inquiring into the fact whether it did or did not exist. Such rule is declared by this statute and must be enforced. . . . The purposes intended were: 1. The prevention of actual fraud in procuring an elector to vote unintentionally for a candidate whose name is not on the regular ballot of his party; and 2. To remove inducements for attempting such fraud, by declaring that a name so printed in a regular ballot, instead of the regular candidate, shall not be counted. Such wrong and such remedy were the full measure of the legislative intention." See also *Shields v. McGregor*, 91 Mo. 534, and *State v. McKinnon*, 8 Or. 499, 500.

It is always a question whether statutory provisions like the one in question are directory or mandatory. In *State v. McKinnon*, 8 Or. 493, where the statute provided that the ballot should be on plain white paper without any mark or designation, and a ballot on colored paper was rejected as illegal, it was said that, although the authorities cited against the rejection of the ballot sufficiently illustrated the principle governing the construction of statutes defining the duties of public officers as to their being mandatory or directory, and the reluctance of the courts to construe statutes providing the manner of elections so as to defeat the public will as expressed through the ballot-box, they disclosed no instance where a voter had been accorded the privilege of disregarding a plain provision of law intended to promote the purity and secure the independence of elections, even in depositing his vote. And in *McCrary on Elections*, sec. 501, where the decision of *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769, holding (under a statute enacting that the ballot should be on "white paper, without any marks or figures thereon intended to distinguish one ballot from another") that ballots printed on common ruled foolscap paper of a bluish tinge were legal; that the paper was white within the meaning of the statute, and was used accidentally, and that the ruled lines were not placed there for the purpose of distinguishing the ballots, is referred to as having been decided upon the ground that the paper was not used with an intent to violate the statute, it is said: It is quite clear that where a statute distinctly declares that ballots having distinguishing marks upon them shall not be received or shall be rejected, it should be construed as mandatory and not simply directory. And in the next succeed-

ing section the same author says, that if a statute prohibits the marking of ballots so that they may be distinguished by others than the voter, and declares such ballots void, there is good reason for construing it as mandatory.

In our judgment the statutory provision under discussion is mandatory. Its purpose was that any ballot having any feature clearly prohibited by it should be deemed illegal, and not be treated as the lawful expression of an elector's will. To the extent that the law-makers have gone, it is a valid regulation of the right to exercise the elective franchise. Viewing it in the light of the practical working of elections in so far as the preparation and distribution of ballots go, we see in it nothing amounting to an unconstitutional restriction of the right to vote. The object intended to be effected was the independence of the voter, and this was sought to be secured by prescribing to a certain extent the form of the ballot, and excluding from it whatever was within the prohibition of the provision, and thereby securing the secrecy of the ballot; inviolable secrecy as to the person for whom an elector may vote being the material guaranty of the constitutional mandate that voting at popular elections shall be by ballot: *State v. Anderson*, 26 Fla. 240, 259. The nearer the lawful approach to a perfect uniformity of ballots, the more perfectly is the secrecy of the ballot, and consequently the independence of the voter, secured. The greater the uniformity, the less the possibility of distinguishing marks.

It is, however, not to be lost sight of that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law. In *Commonwealth v. Woelper*, 3 Serg. & R. 29, 8 Am. Dec. 628, it is said: "The case is certainly within the words of the law. The ticket had something more than names on it, but is it within the meaning of the law? I think so." In *State v. Phillips*, 63 Tex. 390, 51 Am. Rep. 646, it is said that the decisions rather tend to restrict the exceptions which exclude a ballot than to extend them, and to admit the ballots if the spirit and intention of the law is not violated, although a liberal construction would violate it. . . . The result as shown by the tickets deposited by legal electors must not be set aside except for causes plainly within the purview of the law; and, in *Owens v. State*, 64 Tex. 500, the doctrine

asserted is that all statutes tending to limit the citizen in the exercise of the right to vote should be liberally construed in his favor. This is the rule by which, in our judgment, the statutory provision before us is to be judged, and its meaning arrived at and enforced. It is illustrated by the foregoing decisions of the supreme court of Indiana. In these cases, though the language of the statute excluding "distinguishing marks or other embellishments" did not confine such exclusion to the back of the ballots, yet, as the inspectors were not given power to reject or refuse to count any ballot which had found its way into the ballot-box, but were authorized only to refuse all ballots offered of any other description, the statute was construed to have been intended only to protect the voter against having the nature of his vote detected, before his ballot went into the box, through its color, or some distinguishing mark thereon, by other persons who might be seeking to control him through intimidation, or otherwise, and that this purpose could be attained as effectually as was possible to legislative enactment by securing uniform external appearance, and hence that distinguishing marks on the inside or face of the ballot could not be held to be within the purpose or purview of the statute. And it was also held that the ballots were good, even where the printing of the words on the inside was such as to be visible on the outside, and were even actually seen by the inspectors, and that where a ballot was within the letter of the statute, it was not to be rejected, even though it had distinguishing marks.

And the rule stated above is perhaps more fully applied in the cases from Texas, referred to above. The effect of these Texas cases is that the word "device," associated as it is with the words picture, sign, vignette, and stamp-mark, is on account of such association to be construed to have meant some "figure, mark, ornament, emblem, or cipher" which would distinguish the ticket from others cast at the election, and not to include the shape of the ticket, the residence of candidates, nor the names of candidates for president and vice-president, nor the words "election ticket," nor the words "People's ticket," printed about the middle of the ticket. There cannot be any doubt that the rhomboid shape or any of these words was equally as efficient an agent for identifying a ballot as an eagle, a crescent, a flag, a square or compass, flowers, leaves and tendrils, or enigmatical character would have been.

The question what is within the prohibition necessarily

includes that of "what is the prohibition," and to answer the question whether or not the ballots assailed in this action are within the prohibition of the act of 1887, we must determine what is its prohibition. There is no question as to the paper being white or clear and even cut. We have seen what the rule is as to what may be called the different shades of white. This case turns upon the words "without ornament, designation, mutilation, symbol, or mark of any kind whatever, except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen." It is entirely clear that the words "National Republican ticket," and those of "Free Suffrage ticket," printed as they are in type of the same size as the names or style of the office voted for, and in the same plain Roman letters, are not ornaments, nor mutilations, nor a symbol. Are they designations or marks?

The term designation, if it stood alone, might necessarily mean any designation of a ballot, as Democratic, Republican, Prohibition, or by other appellation. The meaning of designation, as found in the dictionaries, includes appellation; it, according to Webster, is: "That which designates; distinctive title; appellation." According to Worcester its meaning is: "That which serves to distinguish." But the distinctive title, or name, or appellation, definition, as distinguished from the meaning of distinguishing by marks, is not within the meaning of the word as it is here used. This is shown by the use of the words "ornaments, mutilation, symbol," and particularly, in conjunction with them, those of "or mark of any kind whatsoever." Ornaments, mutilations, and symbols are marks as distinguished from words or sentences, or appellations, or distinctive titles, and not only do they indicate that it is in this character the term "designation" is used, but the terminal expression, "or mark of any kind whatsoever," shows both that the legislature understood itself as meaning, by the associated use of each and all the preceding terms, including that of "designation," things in the nature of marks as distinguished from words or writings, and as intending by these terminal words to prohibit any other thing in the like nature of a mark. If it had been the intention of the legislature to go beyond the distinctive character of the specific words, it would not have confined its concluding prohibiting words to marks, or any particular class of things, but would have used some general expression like "or anything whatsoever." As

it is, the word "designation" is the only one in the group which is not confined in its meaning to the classification of marks, or that can include in its meaning words or appellations, and this being so, it must, unless there is something in the statute to prevent it, be construed to have been used as meaning only such designations as are in the nature of marks, which meaning is unquestionably included in the definition of the word.

Is there anything in the section, or in the statute, to preclude or defeat this construction? The first suggestion is, that the words "except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen," have this effect. If so, it is because they are made an exception to what would be prohibited by the preceding words, but for such exception. Upon both reason and authority we do not think this position tenable. The names of the persons voted for, and of the offices which it is proposed they shall fill, are not within the prohibitory words, and would not be if the section contained nothing that follows the word "whatsoever," or, in other words, only contained what precedes the word "except." Though the provisions following the word "whatsoever" are in form of an exception seeming to exclude them from the effect of preceding words, they are in fact not within the meaning or purpose of these words. Not only was it not the purpose of these words to exclude from the ballot the names of the persons and offices, but, as we have shown above, nothing is within their purpose or effect but things in the nature of marks, as distinguished from words or appellations.

This same point was practically involved in the Texas cases. There the ballot was, under the statute, to be "without any picture, sign, vignette, device, or stamp mark, except the name of the political party whose candidates are on the ticket." Still it was held that the prohibitory words preceding the word "except" meant only some figure, mark, ornament, emblem, or cipher, and did not include the residence of candidates, nor the names of candidates for President and Vice-President, nor even the words "People's ticket," written about the middle of a ballot having the heading "Democratic ticket." The very same form of expression used in our statute is to be found in the Indiana statute (1867). In Missouri the statutory provision was that the ballot "shall not bear upon it any device whatever, nor shall there be any

writing or printing thereon, except the names of persons, and the designation of the offices to be filled," yet allowed truthful captions; still, when a sheriff was *ex officio* collector, a ballot having the words "sheriff and collector" on it was held to violate the law.

Nor do we think there is in any other part of the statute anything that can be successfully invoked to overcome the views announced above as to the effect of the prohibitory clause. The only other feature that seems worthy of consideration in this connection is the concluding clause of the section under discussion, which clause is in these words: "and no ballot of any other description shall be counted." In the Texas statute it was provided that "any ticket not in conformity with the above shall not be counted in counting the votes"; while the Missouri statute enacted that "any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and shall not be counted." These provisions merely announce the consequences to attend a ballot which is in violation of the statute; they do not add to or take from those provisions which prescribe or regulate the ballot; it is by the latter, and not the former, that we determine what can and cannot be on a ballot without violating the law.

We fail to find in the decisions falling under our observation, unless it be those in Connecticut, anything which conflicts with the conclusion indicated above. There is certainly nothing in the Pennsylvania and California cases; on the contrary, that of *Coffey v. Edmonds*, 58 Cal. 521, might be cited as affirmatively supporting our views. In the two Mississippi cases involving the statutory provision as to "any device or mark," the printer's dash line, on account of which the ballots were held illegal, were clearly "marks." We are not called upon to decide between the conclusion of that court in the third case, *Perkins v. Carraway*, 59 Miss. 222, and the views of the California court in *Kirk v. Rhoads*, 46 Cal. 398, as to the very slight departure from the prescribed space between names on a ballot.

In the Connecticut case, the court puts the rejection of the ballot which contained the name of a candidate and office not the subject of choice at the election in question, and the one which had on it the *ex officio* duty of the town clerk, on the plain prohibition of the statute, that in addition to the official indorsement, the ballot shall contain only the names of the candidates, the office voted for, and the political party

issuing the same, as to which, in the opinion of the court, there was no room for construction, or judicial power to inquire into the extent or consequences of a violation. We do not say that this conclusion, at least in so far as the *ex officio* feature of one of the ballots, is not in conflict with the Missouri case of *State v. Watson*, 9 Mo. App. 594. In the case of *Fields v. Osborne*, 60 Conn. 544, we find that the Connecticut court in deciding, under the same provision of the statute, a question as to the effect of the use of the word "for," before the name of the office, admits that the statute was not plain and clear, but that its language was ambiguous, and recognizing the rule upon which we stand and have asserted above—that in such cases the duty is to construe "so that the voter will not be deprived of his vote except upon a plain and unambiguous provision of the law"—it held that the provision referred to did not either in terms and expressly or by necessary construction prohibit such use of the stated word. It further held, however, that the word, used as it was in all the tickets of the same class, was not within the "mark or device" provision of the act, yet expressed the opinion that it would have been if some of them had had it and others had not. In this last expression of opinion as to what might or would be the law under certain facts alone, and not in anything decided as to a case actually before it, is there even any seeming conflict between our own conclusion and that of the Connecticut court? It is apparent that the statute of that state goes much further than ours, and that in ours there is much more room for construction, and we find in the expression of that court nothing in view of our statute and the authorities upon which we rest, to shake the conclusion we have reached.

Our conclusion is that the ballots assailed are legal, and that it is the respondent, and not the relator, who was duly chosen to the office in question at the election in 1888; and further, as held in a former opinion in this cause, that though the respondent did not, for the reasons there indicated, qualify and receive his commission under that election, he has, in the absence of an appointment by the governor since the commencement of the new term, continued to be clerk of the circuit court of Hernando County by virtue of his former commission, under section 14 of article 16 of the constitution: *State v. Saxon*, 25 Fla. 792.

Judgment will be entered for the respondent.

Mr. Justice TAYLOR dissents.

ELECTIONS — LAWS REGULATING. — The law must regulate the right to vote by facilitating its lawful exercise and preventing its abuse, but it must not impair or destroy it: *Attorney-general v. Common Council*, 78 Mich. 545; 18 Am. St. Rep. 458, and note.

ELECTIONS — POWER OF LEGISLATURE TO REGULATE. — It is within the power of the legislature to prescribe the manner of holding elections and the mode in which electors shall express their choice: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note; but it must not so regulate elections as to make the exercise of the elective franchise so difficult as to amount to a denial: *De Walt v. Bartley*, 146 Pa. St. 529; 23 Am. St. Rep. 814, and note.

ELECTIONS — STATUTES REGULATING — WHEN MANDATORY. — If a statute expressly declares any act essential to the validity of an election, the courts must hold the statute to be mandatory, whether the particular act affects the result of the election or not: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note.

ELECTIONS — BALLOTS — EFFECT OF MARKS OR DEVICES ON: See *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212, and note; *State v. Phillips*, 63 Tex. 390; 51 Am. Rep. 646, and note. Marks placed upon a ballot or series of ballots must be such of themselves as to furnish strong proof that they were placed there for the purpose of identification: *People v. Board of Supervisors*, 135 N. Y. 522. See also *Kellogg v. Hickman*, 12 Col. 256, and *Coffey v. Lyman*, 92 Cal. 135.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

SMITH V. WILLIAMS.

[89 GEORGIA, 9.]

HUSBAND AND WIFE — MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN. — When by law a husband is the sole heir of his wife, and his marital rights can attach to her real and personal property, her children upon her death will take no interest in a devise or legacy to which, under her deceased father's will, she was entitled at the time of her marriage, and as to which she died intestate.

HUSBAND AND WIFE — MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN. — The fact that a husband, who has acquired land by virtue of his marital rights, and by inheritance as sole heir of his wife, has often declared while in possession that it belonged to his children, and that he intended they should have it, together with the fact that he has placed some of them temporarily in possession of part of the land, is not sufficient to vest the title thereto in them nor to raise a trust in their favor.

HUSBAND AND WIFE — MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN. — When a married woman to whom her father has devised part of his estate predeceases him intestate, her children living at the time of the testator's death take as her representatives under the will of their grandfather; and that part of the estate which their father has received for them in land, or invested in land, and which is capable of identification, may be recovered by them from him or from any one holding under him, unless their title has been defeated by prescription or some other means.

EVIDENCE. — ADMISSIONS TO BE RECEIVED AS EVIDENCE must be identified as coming from one whose admissions would be legal evidence in the case.

WILLS — EVIDENCE. — When a will directs that land shall be sold and slaves divided in kind, evidence that the slaves have been divided in kind and assigned to the several legatees is not admissible to show that the land has been sold or divided and allotted to the legatees in like manner.

JUDGMENTS — STATUTE OF LIMITATIONS. — A judgment does not become dormant when execution thereon issues within seven years from its rendition, and entry as prescribed by statute has been made within every seven years thereafter.

James Whitehead and J. H. Lumpkin, for the plaintiff in error.

H. T. Lewis, J. C. Hart, and C. Heard, for the defendant in error.

BOYNTON, J. A recovery must be predicated upon a legal right. A verdict, to be sustained, must be supported by evidence and authorized by law. We do not think the verdict rendered in this case can be maintained under either of the above truisms. The plaintiffs in the court below, defendants in error here, claim that their right to the land in controversy is derived from the will of their grandfather, John W. Rudisill, who died in December, 1854, testate. Their father, H. D. Smith, one of the executors under the will, intermarried with two of testator's daughters, both of whom were legatees under the will. The first wife of said Smith, the mother of three of the plaintiffs, was in life when the will was executed, but died shortly before her father. Soon after the death of testator, said Smith married another of his daughters, who died in 1867, leaving six children, who are also plaintiffs. The plaintiffs, in their petition, allege that the land belonging to the estate of John W. Rudisill was in 1857 divided by the executors among the legatees, and that their father received two shares thereof, one for the children of his first wife, and one share for the children of his second wife, "for it was agreed," as they allege in their petition, "by the executors and all of the legatees, that it was the true intent and meaning of the will that the children of deceased legatees should represent the parent in the distribution of the estate, and in this way H. D. Smith, their father, went into possession of two shares of said estate and held the same as a continuing subsisting trust for plaintiffs during his lifetime, or at least until the lands were sold by the sheriff."

After a careful scrutiny of the will, we regard this construction of it as unwarranted. Neither the context of the will nor the facts disclosed by the record sustain the idea that the children of the second wife represented their mother in the distribution of their father's estate. She was a *feme sole* when the will was executed and when the testator died. The legacy bequeathed to her was without trust, condition, or limitation, and consequently vested absolutely in her on the death of the testator, and she had a perfect title to the legacy when she married. She was living when land belonging to the es-

tate was disposed of by the executors in 1857. It was therefore impossible for her children to have represented her as deceased, and take her legacy while still she lived, and some of them were not then *in esse*. The lands belonging to the estate were disposed of by the executors in 1857, and as a result of that disposition H. D. Smith then went into possession of the tract known as the "Home" or "Bermuda" place; and in 1858 he purchased from John W. Rudisill, Jr., the mill tract, and he then went into possession of it under a deed conveying it to him in fee. It is claimed that he used, in paying the purchase-price of this tract, a part of the legacy of his second wife. If this be true, then in that way he reduced that portion of her legacy to his possession. In 1864 Smith purchased and went into possession of the Printup tract under a deed conveying it to him in fee. These three tracts make up the land in controversy, and from the dates above mentioned H. D. Smith was in possession of the several tracts and used and controlled them in all respects as his own, gave them in for taxes, and paid the same every year until sold by the sheriff in 1875.

1. From this statement of facts, it clearly appears that Smith reduced to his possession all of the interest which his second wife had in the land, whether acquired by purchase or division in kind. Under the law then in force, upon marriage the real as well as the personal property of the wife vested in the husband, and his occupancy of the land is evidence that he had reduced it to possession, even if that were necessary to the consummation of his right: *Royston v. Royston*, 21 Ga. 161; Cobb's Digest, 294. If Smith's marital rights did not attach under the facts and law above stated,—if he did not acquire title to his wife's legacy by marriage and the reduction of same to possession,—then the title remained in the wife, as there is no evidence whatever showing or tending to show that she ever disposed of her title in any way; and when she died in 1867, under the law as it then was, her husband was her sole heir, and on the payment of her individual debts, if any, was authorized to take possession thereof without administration: Code of 1863, sec. 1711; *Bryan v. Duncan*, 11 Ga. 67; *Royston v. Royston*, 21 Ga. 161; *Bryan v. Rooks*, 25 Ga. 624; 71 Am. Dec. 194. The law making children joint heirs with husband on death of wife was not passed until 1871: Acts of 1871-72, p. 48; Code, sec. 2484.

2. Having thus ascertained that Smith had, by his marital

rights and inheritance, acquired a perfect title to all the interests and rights which his second wife had in the land, and that her children never acquired any title thereto under the will, or any equity therein by the distribution of the estate, his often repeated declarations made while in possession, to the effect "that the land belonged to his children; that he received it for the children of his first two wives — he held it for his children"; "I holding it in trust for the children, and intended they should have it," and placing some of his children temporarily in possession of parts of the land, was not sufficient to transfer the title from himself and vest the same in his children. Title to lands must be evidenced by writing, and such declarations could not create for his children an express trust in the land, for "all express trusts must be created or declared in writing": Code, sec. 2310. These children of the second wife had no beneficial interest in the land by the payment of purchase-money or any part thereof, nor does the record disclose any right or equity in them to constitute a predicate on which to raise an implied trust by parol: Code, sec. 2316.

It is insisted that the sheriff's sale was a contrivance between Smith and his third wife, the plaintiff in error, to prevent other creditors from seizing the land, and for the purpose of having her purchase it at the sale and hold it for the defendants in error, and to divide the same amongst them. The record shows that the sale was resisted by affidavit of illegality; by taking homestead; and when brought to sale, the land was bought by the plaintiff in error, and the price paid was applied to an execution which she had purchased for a small sum, but paid for with her own money; and the only promise she made was that the defendants in error could have it by paying back to her the money she had paid out for the land. This they have never done or offered to do. Smith recognized the legality of the sale, and that the purchaser had a legal title and possession under her title, and aided her in procuring a loan of money by pledging the land as security. This would estop him from now setting up title if he was alive. Whether it will estop his heirs is a question we need not decide, as they do not claim in this suit as heirs at law. For these reasons we think the verdict in favor of the children of the second wife contrary to both law and evidence.

3. The *status* and rights of the children by the first wife are materially different. She was a legatee under the will;

the legacy to her was "absolute and without remainder or limitation"; she predeceased the testator, and had children living at the time of his death. Therefore, by operation of law, they did represent their mother in the distribution of the estate, because "if a legatee dies before the testator, or is dead when the will is executed, but shall have issue living at the death of testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their deceased ancestor": Code, sec. 2462. Hence, if it be clearly shown that the land of the estate was divided in kind, and a share was allotted to the first wife or to her children, and such share was a part of the land in controversy; or if Smith bought a part of the land involved in this litigation and paid for it with a part of the legacy to which these children were entitled, then they would be entitled to recover such tract or parcel of the land as may be identified as land allotted to them in the distribution, or as was bought and paid for with funds belonging to them, unless the defendant in the court below has acquired such a title by prescription, or otherwise, as will bar their right to recover.

4. The fifth ground in the motion for new trial alleges error in admitting in evidence the answer of a witness in which he says that he learned the facts therein from "others, Smith, and his wife's mother." The information obtained from Smith was competent evidence, but what the witness learned from "others" and his wife's mother was not. And it being doubtful whether all or what part of the answer was learned from Smith, it should have been excluded. Admissions to be received as evidence must be identified as coming from one whose admissions would be legal evidence in the case. That is not clearly done in this instance.

5. The will directs that testator's land should be sold by his executors, and his slaves divided in kind. An exemplification from the records of the ordinary's office showing that slaves had been divided in kind and assigned to the several legatees by lot, even if complete and regular, was not admissible to show that the land had been divided and allotted to the legatees in like manner.

6. The *feri facias* in favor of Sidney C. Shivers, and the one in favor of Cosby Connel, under which the home or Bermuda place was sold, were each issued from judgments rendered in 1866, a levy by sheriff was entered on both in

November, 1868, and again levied in July, 1875; so they were not dormant, because at no time did seven years elapse between entries, which would prevent dormancy. The *feri facias* in favor of Turner and S. C. Shivers, under which the mill tract was sold, were both dormant, because the judgments from which these *feri facias* issued were rendered after June 1, 1865, and no entry had been made on either, by a proper officer, for more than seven years prior to entry of the levy under which the land was sold. The decision pronounced in the case of *Turner v. Grubbs*, 58 Ga. 278, and reiterated in *Smith v. White*, 63 Ga. 236, and *Mosely v. Sanders*, 76 Ga. 293, we think fully covers and sustains our ruling on this question.

Judgment reversed.

HUSBAND AND WIFE — HUSBAND AS WIFE'S HEIR. — For an extended discussion of this subject, see monographic note to *In re Ingram*, 12 Am. St. Rep. 81. The wife's property on her death vests in her heirs, and her husband has no claim therein, unless he is one of her heirs; *Bufford v. Holliman*, 10 Tex. 560; 60 Am. Dec. 223. See also *Newcomer v. Orem*, 2 Md. 297; 56 Am. Dec. 717; and *Baldwin v. Carter*, 17 Conn. 201; 42 Am. Dec. 735, and note, in which it was held that property devised to a wife as her separate estate went to her administrator, and not to her husband, upon her dying without issue: *Contra, Robins v. McClure*, 100 N. Y. 328; 53 Am. Rep. 184.

ADMISSIONS AS EVIDENCE. — See extended note to *Richardson v. Richardson*, 30 Am. Dec. 544-549. Admissions should be clearly proved, deliberately made, and precisely identified in order to be good evidence: *Printup v. Mitchell*, 17 Ga. 558; 63 Am. Dec. 258, and note; note to *Wallace v. Matthews*, 99 Am. Dec. 480.

CHATTANOOGA, ROME, AND COLUMBUS RAILROAD COMPANY v. LYON.

[89 GEORGIA, 16.]

RAILROADS — DAMAGES FOR CARRYING PASSENGER PAST DESTINATION —

EXCESSIVE DAMAGES. — When a young lady passenger on a railway train is carried one and one half miles past her destination, and there put off the train without personal violence and without being exposed to serious inconvenience, real danger, or harm in walking back to her destination, a verdict for two thousand dollars damages is excessive and will not be sustained, although the conductor in requesting and commanding her to leave the train may have addressed her in a loud tone of voice.

THE LAW AND THE LADY. — The courts of Georgia will never be found wanting in their respect and devotion to the fair women of that state. They will always regard them as incomparably the best and most desirable portion of the population, and will never be disposed to deny them the fullest protection in the enjoyment of their rights which the law properly administered can give without "stretching" legal principles too far,

simply because there is a lady in the case. At the same time the courts must guard against that species of "incurable insanity" the natural tendency of which is to unduly favor the gentler sex as litigants.

RAILROADS — DUTY AS TO FLAG STATIONS. — The sale of a ticket to a particular flag station, to be used on a given train, imports an undertaking on the part of the railway company selling it, not only to take the passenger to that station, but to stop there, and allow him a reasonable time and opportunity to alight. A failure on the part of the company to comply with the duty is generally negligence for which it must respond in damages.

RAILROADS — DUTY AS TO FLAG STATIONS. — When a railway company sells a ticket to a flag station at which its trains do not stop unless signaled for the purpose of receiving or discharging passengers, it is generally the duty of the conductor in charge of the train to ascertain if any passenger is to get off there, and, if so, to stop and allow him an opportunity to alight. A failure to perform this duty is negligence, for which the company is liable in reasonable damages, with additional damages if the passenger is wrongfully ejected after his destination is passed. This rule is subject to modification when the circumstances are such as to make it unfair and unjust to attribute negligence to the company.

W. W. Brookes and W. T. Turnbull, for the plaintiff in error.

Wright and Meyerhardt, for the defendant in error.

LUMPKIN, J. 1. The testimony of the plaintiff, formerly Miss Fincher, now Mrs. Lyon, was substantially as follows: On April 6, 1889, she walked a half-mile to Holders Station, on the Chattanooga, Rome, and Columbus Railroad, part of the way being through the woods, and bought a ticket to Brookes Station, about six miles distant. The ticket was exhibited to the jury. She took the train about half-past one o'clock in the afternoon, the conductor assisting her to get on. He did not ask her destination, nor did she tell him, but after helping her on the train he went on through the car, and no one came to take up her ticket. She was not accustomed to traveling on railroads. The train passed Brookes without stopping, and she did not know when it passed, but would have known that station had she been looking. The train stopped at Lake Creek, a mile and a half beyond Brookes. She then went to the door, and while standing in the door, and the conductor was out on the steps, he told her in a loud tone of voice, and in the presence of other people, to get off. She replied she did not want to get off there, and he said she must do so. She told him she was alone and did not know the road, and he said it was only a mile and a half up the railroad to Brookes. He did not take hold of her, but when he told her to get off, she just got off and went on back to Brookes, as he told her, up the railroad, walking. Some

of the way was through the woods. She did not see any young lady at the station where she got off, and no lady offered to walk with her up the railroad. Plaintiff was going to see her sister, who resided a quarter of a mile from Brookes, and intended to walk from the station to her sister's house. She lived in the country, and was in the habit of walking a good deal; was in the habit of walking as far as a mile and a half; would not have considered that much of a walk if she had known the way and had not been alone. The day was pleasant, and she found her way back to the station easily, and reached her sister's in safety. No one met her at the station, nor did she expect to be met there, as they did not know at her sister's she was coming. The conductor did not say anything about her stopping at Lake Creek and waiting for the next train, nor did he offer to take her to Cedartown and send her back on it, nor did she ask to be taken to Cedartown.

Two witnesses for the plaintiff (Smith and Wright) testified to an occasion when they saw a conductor on this railroad treat a young lady rudely. One of them fixed the time of its occurrence as being in March or April, and the other in March. The former did not see the conductor take her by the arm; the latter did. Both stated his language and manner were discourteous, but neither positively identified the young lady of that occasion as the plaintiff in this case. One said he saw a resemblance in the plaintiff to the young lady he saw put off the train, and added that his main reason for thinking the lady he saw on the train was the plaintiff was, that on reaching Cedartown he met a gentleman, not a resident of Cedartown, to whom he told the incident on the train, and this gentleman said he supposed it was a lady he was expecting at his house that day. The witnesses located the conversation between the lady and the conductor as beginning with both parties inside the car.

It is not at all certain, but, on the contrary, exceedingly doubtful, that the occasion referred to by these witnesses is the same as that to which the plaintiff testifies, especially so because she herself does not make the conduct of the conductor by any means so reprehensible as they do, nor does her testimony coincide with theirs as to where the conversation with the conductor began. The strong probability is, that what they saw and heard was at some other time and involving some other lady. The gentleman at Cedartown

who said a lady was expected at his house the day the witness told him of the incident on the train could not probably have referred to plaintiff, because she states the visit she was making that day was unexpected.

The material parts of the testimony of the conductor were to the following effect: Brookes is a flag station at which trains do not stop except to put off or take on passengers. When plaintiff got on the train he understood from friends who accompanied her to the train that she was going to Brewer's, a station below Lake Creek, and for this reason and the fact that he had no other passenger to get off before reaching Lake Creek, he did not call for her ticket before reaching Brookes. After discovering that she had passed her station, he politely offered to put her in charge of a lady agent of the company at Lake Creek until the next train going towards Brookes came along, or take her on to Cedar-town, where he met that train, and send her back on it; or if she preferred, she could walk back to Brookes. She said she did not know the way back, and he told her to keep down the railroad, and the lady agent offered to show her the way or go back with her. She then voluntarily left the train. His treatment of the young lady was gentle and kind, and the tone of his voice perfectly mild. The porter on the train corroborated the conductor's statement.

In view of the foregoing summary of the testimony, there can be no better way of dealing with the merits of this case than to treat it as if the testimony of the plaintiff presented the exact truth of what occurred. The jury certainly did not accept the conductor's version of the matter, and we have no authority to say they erred in this respect. They may have been influenced to some extent by the testimony of Smith and Wright, but we cannot be sure of this. Again, it is very doubtful, as has been seen, whether their testimony relates to the real transaction under investigation, and even if it does, it is more than probable that the plaintiff herself gives the most accurate and reliable account of it. There can certainly be no want of fairness or justice to this lady in accepting her statements as absolutely true. Thus viewed, can the verdict for two thousand dollars be sustained? We think not. According to her own account, the inconvenience she actually sustained was not at all serious. It seems that it was her habit to walk a great deal, and she says that a walk of a mile and a half on a pleasant day in April was not "much of a

walk." The fact that a part of her walk along the railroad was "through the woods" is offset by the fact that a part of her walk to the station where she took the train was also "through the woods." Her difficulty in finding the way was inconsiderable; she had only to follow the railroad track, and she admits she did so easily. It does not appear that she was exposed to any real danger or harm, and there was but little occasion for alarm. So far as the facts just recited are concerned, it seems to us that no unbiased mind could reach the conclusion that for alleged injuries of this kind two thousand dollars would not be utterly unreasonable and extravagant.

Does the behavior of the conductor, in connection with the other facts, justify any such finding? We feel constrained to say it does not. It was probably his duty, under the circumstances, to do exactly what he swears he did. But discarding his testimony and accepting that of the plaintiff, he told her in a loud tone of voice she must get off the train. He used no insulting language; he did not touch her or otherwise offer her personal violence, nor did he in any way restrain or control her movements other than by the request, or command, addressed to her loudly. The element of loudness, though not even alleged in the declaration, constitutes the chief impropriety of his remarks; and while we do not, of course, approve of this manner of speaking to a lady, we do not think the vindictive damages included in this large verdict are warranted by the facts as stated.

This court, we trust, is not wanting in respect and devotion to the fair women of Georgia. We regard them as incomparably the best and most admirable portion of our population, and will never be disposed to deny them the fullest protection in the enjoyment of all their rights which the law, properly administered, can give. At the same time, we are unwilling to subject ourselves to such a criticism as was made by that great judge, Hon. Iverson L. Harris, upon his distinguished brethren, in *Clements v. Bostwick*, 38 Ga. 1, in which he thought they had stretched a principle very far in sustaining a widow's right to dower. Speaking of their judgment, he said it could be justified only on the ground on which Steele defended Dryden, who had compared the Duchess of Cleveland to Cato, the wit vindicating the poet by saying, "there was no stretching a metaphor too far when a lady was in the case." We fear that courts and juries are becoming too apt to stretch damages too far when they are to be awarded to one of the

gentler sex. Judge Harris concludes his dissenting opinion by saying: "For many years I have witnessed with uneasiness the quixotism which the bench displays whenever a woman is a party, or a woman's claims are involved. I fear that it is an incurable insanity, as thus far it has exhibited no obedience to law, and is deaf to reason, and even insensible to ridicule."

The danger was not, and is not, so serious as this language would imply, but there is undoubtedly good reason for the courts to guard against the natural tendency to unduly favor women as litigants. Striving earnestly to look at the case before us carefully and impartially, we cannot avoid the conviction that it affords an instance of this kind, and that the ends of justice require another trial. It is needless to cite the numerous cases in which verdicts for large amounts have been rendered in cases more or less similar to the present one, or to point out the instances in which they have been allowed to stand, or have been set aside. As each case must at last depend on its own peculiar facts and circumstances and be tested with reference to the same, precedents of the kind referred to are of no great value.

2. It being doubtful, as already shown, whether or not the testimony of the witnesses Smith and Wright related to the transaction really in issue, it was the province of the jury, and not of the judge, to determine this question. The court, therefore, rightly admitted the testimony and gave the proper instructions concerning it, except that he might have made the addition suggested. Without this addition, it can scarcely be doubted that the jury understood they were to disregard this testimony if in their opinion it related to another and entirely different occasion.

3. Complaint is made of the following charge of the court: "If the plaintiff purchased a ticket at Holders Station to go to Brookes Station, and got aboard of the train, if they failed to stop the train, if the conductor failed to come into the car or stop the car, according to contract, at Brookes Station, she would be entitled to nominal damages, if that was brought about by no fault on her part." It is urged that this was error because Brookes was a flag station, and she should have given notice to the conductor, especially when the evidence showed it was only a few minutes' run; and it was error further, because there was no evidence of a contract to stop at Brookes.

The plaintiff sued for an alleged tort, and not for breach of contract. The theory of the action is that the defendant contracted to carry her to Brookes and land her there, and that its violation of this contract was a breach of its duty as a common carrier, constituting a tort for which she can recover, and in connection therewith, also for the alleged wrongful and tortious conduct of the conductor in ejecting her from the train after passing her station. The above quoted charge was doubtless given upon the idea that the sale of the ticket to Brookes Station was an absolute contract by the defendant to stop the train there, with or without notice to do so from the passenger, and that a failure to stop would, consequently, be a breach of duty amounting, as stated, to a tort for which the plaintiff, whether actually damaged or not, could recover at least nominal damages. In view of the nature of the action as above stated, and of the evidence submitted, the charge was correct if the sale of the ticket to Brookes Station necessarily involved an absolute and unconditional undertaking by the defendant to stop the train there. If, however, the contract was not thus absolute, and it was the duty of the passenger to notify the conductor of her desire to stop at this station, the mere failure to stop would not entitle her to even nominal damages.

As a general rule, we think the sale of a ticket to a particular station, to be used on a given train, imports an undertaking on the part of the company not only to take the passenger to that station, but to stop there and allow him reasonable time and opportunity to alight. Leaving out of consideration, for the present, the question whether or not there may be instances when this rule should not operate, it would seem, in the absence of some special reason for requiring a passenger to notify the conductor of his destination before being called upon to exhibit his ticket, that so doing would be ingrafting upon the contract a condition outside of its terms and not usually contemplated by the purchaser. The holder of the ticket has, ordinarily, the right to assume, when he buys it, that the company will safely land him at his destination. Accordingly, he has the right to presume the conductor will call for his ticket before reaching the station specified, and thus obtain notice of the fact that he desires to stop at such station. Of course, when the conductor takes up and examines the ticket, the information will be thus conveyed to him that he has a passenger for this station, and

there will be no difficulty at all in his carrying out the contract which has been made between the company and the passenger. When a railroad company sells tickets to a station of this kind, it unquestionably does so for the purpose of obtaining the money of its customers, and all of its employees certainly ought to know that upon every passenger train there are likely to be one or more passengers for such stations. Beyond doubt the agent who sells the ticket is aware of the fact that there will be on the train for which the ticket is sold a passenger of this kind, and in most cases the conductor will be able to ascertain the fact by prompt and proper attention to his duties. Every company should so conduct its passenger business as to adequately serve all of its customers, and if any company, without sufficient excuse, fails to do this, the omission amounts to negligence, and it will be responsible for the consequences. The general rule, therefore, as to the duties of railroad companies toward passengers holding tickets for flag stations should be as we have stated; but, as already intimated, we do not think this rule should be inflexible. There may be circumstances under which a passenger for a flag station is carried beyond his destination when it would not be fair or just to attribute the fact to the company's negligence.

In a recent Texas case, *Gulf etc. R'y Co. v. Ryan*, 18 S. W. Rep. 866 (Tex. Ct. of App., March 23, 1892), it appeared that defendant in error bought a ticket to a flag station, knowing it was such, and that trains did not stop there "unless some request was made upon the conductor to do so." It would seem that he bought the ticket subject to the condition that he must notify the conductor of his destination, and failing to do so, it was held he was not entitled to recover. Aside from instances like this, there may be other occasions, which we will not attempt now to specify or enumerate, when the conductor will be prevented, without fault on his part, from ascertaining in time the desire of a passenger to stop at a flag station, or when, under the circumstances, it is manifestly the duty of the passenger to see to it that the conductor has the necessary information. In cases of doubt as to which should take the initiative, the question may very properly be left to the jury.

This was done in the present case, in that portion of the charge relating to the alleged tortious conduct of the conductor in ejecting the lady from the train. The court said: "It

is charged that it was negligence in the conductor in failing to go back and inquire, and that that brought up this trouble. It is for you to say what is negligence in this case, — whether it was negligence for him to fail to go back in that train, and to pass that station without going back to inquire. I charge you that it is the duty of a railroad company to take extraordinary care of its passengers. It is for you to say whether or not he discharged his duty, — whether or not it was his duty to go back and inquire where the young lady wanted to go." Under the circumstances of this case, this charge was quite as liberal to the company as it had any right to expect. The jury found that the duty of notifying the conductor of her destination was not primarily imposed upon the plaintiff, and assuming this finding to be correct, it follows that there was a breach of duty on the part of the company entitling her to a recovery, in which additional damages to a reasonable amount for her wrongful ejection from the train could very properly be included.

4. In none of the remaining grounds of the motion for a new trial does it appear that any error was committed by the court below, requiring the grant of a new trial. The judgment is reversed solely for the reason stated in the first head-note.

Judgment reversed.

The ruling in the principal case was subsequently affirmed in *Caldwell v. Richmond etc. R. R. Co.*, 89 Ga. 550-553, where the court said: "A railroad conductor should not collect and accept from a passenger her fare to a particular station, knowing she intends and desires to get off there, unless he expects to stop the train at that station and allow her to alight. In this case the plaintiff paid her fare while the train was still within the corporate limits of Atlanta, and distinctly informed the conductor where she wished to leave the train. It was his duty, if he did not intend to stop there, to tell her so, decline to take her money, stop the train at once, and allow her to get off in the city. By accepting the fare under the circumstances stated, he became charged with the duty of stopping at her station and affording her an opportunity to get off. He certainly had no right to carry her beyond this station to another place. A breach of a contract made by a common carrier with one of its passengers is a breach of its public duty for which it is liable in tort. In support of above rulings, see *Chattanooga etc. R. R. Co. v. Lyon*, 89 Ga. 16"; *ante*, p. 72.

RAILROADS — CARRYING PASSENGERS BEYOND DESTINATION. — EXEMPLARY DAMAGES will not be allowed for the failure to stop a train at a station and give a passenger an opportunity to alight unless the failure to stop was willful or the wrong was aggravated by the manner of the trainmen; *Darrah v. Illinois etc. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629; *Thompson v. New Orleans etc. R. R. Co.*, 50 Miss. 315; 19 Am. Rep. 12. For instances in which

exemplary damages will be allowed for a failure to stop a train and let a passenger off at his destination, see *Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9; 30 Am. St. Rep. 17; *Simuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 23 Am. St. Rep. 883. A passenger negligently carried beyond his station may recover damages for the inconvenience, loss of time, and labor of traveling back: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323, and note. See also note to *Walker v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 426.

RAILROADS — DUTY TO STOP AT FLAG STATIONS. — A railroad company will be liable for its failure to stop at a flag station, and take on a passenger to whom it has sold a ticket to and from such station, where the train was properly flagged: *Freeman v. Detroit etc. R. R. Co.*, 65 Mich. 577; *Railway v. Adcock*, 52 Ark. 406. See *Richmond etc. R. R. Co. v. Ashby*, 79 Va. 130; 52 Am. Rep. 620.

JONES v. FOREHAND.

[89 GEORGIA, 520.]

SLANDER — PLEADING. — In an action for slander, a plea of privileged communication may be joined with a plea of the general issue. The speaking of the words need not be expressly admitted by plea, but may be admitted hypothetically. In such case the defendant may be compelled upon the trial to elect upon which plea he will rely.

SLANDER — PLEADING PRIVILEGED COMMUNICATION. — A plea of privileged communication in an action for slander, which shows that the occasion was privileged, is not insufficient because it fails to show that the words were spoken under such circumstances as to make them privileged.

SLANDER. — FROM LANGUAGE PER SE SLANDEROUS MALICE IS INFERRED, but this inference may always be rebutted by proof of the occasion, or other circumstances of justification.

SLANDER — EVIDENCE OF PRIVILEGED COMMUNICATION. — When in an action for slander the occasion on which the words were spoken is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible in evidence.

SLANDER — EVIDENCE OF PRIVILEGED COMMUNICATION. — The defendant in an action for slander cannot testify that the communication alleged was privileged. This is a question of law arising from the occasion and the relation of the parties.

SLANDER — PRIVILEGED COMMUNICATION. — A communication, to be privileged, must be spoken with reference to the subject-matter in hand. If the speaker goes further and makes a defamatory charge against the plaintiff about something having nothing to do with the matter in hand, it is not protected. Nor can the privilege be made to depend merely upon the defendant's good faith and belief in the relevancy of the statement made, and not in any degree upon its actual relevancy to the subject-matter.

W. H. Kimbrough, Hinton and Cutts, and R. F. Lyon, for the plaintiff.

J. W. Haygood, J. M. Du Pree, and Hines, Shubrick, and Felder, for the defendant.

SIMMONS, J. An action for words was brought by Jones against Forehand, his declaration alleging that in November, 1886, the defendant falsely and maliciously spoke to J. J. Turner thus: "I want you to go down to the Drumright place and arbitrate the matter between Jones (the plaintiff) and myself. I want to settle up with him. He has already stolen two bales of cotton from me, and I want to get him off before he steals any more cotton from me." The defendant pleaded not guilty, mitigation, and privileged communication. The jury found for the defendant on the plea of privileged communication. A new trial was denied, and the defendant excepted.

1. It is assigned as error that the court overruled the plaintiff's demurrer to the plea on which the verdict is based. The demurrer was upon the following grounds: 1. That said plea did not set up any sufficient defense to the plaintiff's action; 2. That the plea did not show or admit that the defendant had made use of the words in the plaintiff's declaration alleged, it appearing from the pleadings that the plea of general issue was then and there in and had not been stricken or withdrawn; 3. That the plea did not show that the words alleged to have been spoken were of such a character or were spoken under such circumstances as would make them a privileged communication; and 4. That the law in regard to the action for words did not contemplate the use of slanderous words as being privileged under any circumstances whatever, but that slanderous words *per se* could in no case be a privileged communication.

It is also complained that the court erred in charging the jury in regard to this plea, as follows: "These three pleas (the general issue, mitigation, and privileged communications in bar of right of action) he (the defendant) is authorized by law to file, whether they appear to be contradictory or not. It is the right of a party sued to file as many and as contradictory pleas as he sees proper." This is assigned as error because no plea can be filed or sustained, so long as the general issue remains, that does not admit *in hæc verba* the words spoken as alleged in the declaration.

Where a defendant pleads, in addition to the general issue, that he was authorized by law to do the act complained of, he may be required at the trial to elect upon which defense he will rely, for the code declares that by the latter of these pleas "he admits the act to be done" (sec. 3051); and c:

course he cannot admit the act and at the same time require proof of it by insisting upon a plea by which the act is denied. But while this inconsistency may prevent the consideration of both pleas, it does not prevent the filing of both. The right to file them together, notwithstanding such inconsistency, is clear, under the code, sec. 3453: *Rigden v. Jordan*, 81 Ga. 671. Their inconsistency, therefore, was no ground for striking either one of them on demurrer. While the plaintiff had a right to require the elimination of one or the other of these defenses, he did not avail himself of this right in the proper manner. If he objected to the consideration of both of them, it was his right to insist that the defendant should elect between them, and that the plea of privilege, if relied upon, should be treated as an admission that the words were spoken, and as dispensing, therefore, with proof of that fact. That the speaking of the words was admitted by this plea hypothetically, and not expressly, was not a good objection. Under our system of pleading, hypothetical averments in defensive pleadings have been held allowable: *Urquhart v. Powell*, 54 Ga. 29; and besides, under section 3051 of the code, the plea of privilege, if relied upon, is tantamount to an express admission that the words were spoken. If the defendant is compelled to elect, and he elects to rely upon this plea, the effect is the same, whether the words are admitted expressly or not.

Nor is the plea insufficient on the ground that it fails to show that the words were spoken under such circumstances as would make them a privileged communication. After stating the terms of a contract under which the title to cotton cultivated by the plaintiff was to remain in the defendant as landlord until the former's indebtedness to him should be paid, the plea alleges, in substance, that a dispute arose between them "as to plaintiff's disposing of the two bales of cotton on which defendant had a landlord's lien," and "as to the amounts that plaintiff, both as tenant and cropper, was indebted to defendant, and the quantity of the crops still unsold and on the land cultivated by plaintiff as tenant and as cropper"; and that to settle and adjust this dispute, they agreed that each should select a man to represent himself, and the defendant selected Turner; and in informing Turner of the purpose for which he had been chosen, "endeavored to put him, as his confidential friend who was so to represent him, into possession of all the facts and circumstances in and attending the subject-matters of dispute and contention be-

tween plaintiff and defendant; and that this is the occasion upon which plaintiff alleges the defendant spoke the words set forth in his declaration. . . . Defendant says that this conversation with Turner was private and confidential, and that all he said to Turner about said matters of difference and about plaintiff was said without malice toward plaintiff and with the *bona fide* intent on the part of defendant to protect his own interest in the subject-matters of dispute where it was very materially concerned. Wherefore defendant says if he spoke the words alleged by plaintiff, and spoke them on the occasion and under the circumstances and surroundings as above set forth, and without malice toward plaintiff, they were privileged communications."

Our code (sec. 2980) includes among privileged communications "statements made with the *bona fide* intent on the part of the speaker to protect his own interest in a matter where it is concerned." According to this plea, the alleged defamatory statement, if made, was made at a private and confidential interview between the defendant and a person selected to represent him in the settlement of a dispute with reference to the two bales of cotton to which the statement related, and which involved the plaintiff's conduct in disposing of this cotton, and it was made with the *bona fide* intent on the part of the defendant to protect his own interest in that matter. The occasion therefore was privileged. Whether the language and manner of the communication in characterizing the plaintiff's disposing of the cotton as stealing was so far in excess of what the occasion warranted as to show malice on the part of the defendant, and therefore deprive him of the protection afforded by the occasion, was a question for the jury. A statement made upon such an occasion, if pertinent to the matter in hand, is *prima facie* protected; and this protection remains until overcome by proof of express malice; and though the language, if violent or excessive, may amount to proof of express malice, it should be left to the jury to say whether it amounts to such proof or not: Folkard's Starkie on Slander and Libel, sec. 325, *282 et seq.; sec. 577, *454.

The remaining ground of the demurrer, viz., that language *per se* slanderous is in no case protected, was not pressed in this court; and on this point the law is too well settled to require discussion. From language *per se* slanderous malice is inferred, but this inference is always subject to be rebutted by proof of the occasion or other circumstances of justification.

2. One of the grounds of the motion for a new trial is, that the court permitted the defendant to testify that the plaintiff was indebted to him in money and cotton as a "cropper," the plaintiff objecting that the same was illegal and irrelevant. It is recited in this ground that the court admitted the testimony as illustrating the truth of the plea of privileged communications. Where an occasion is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible in evidence; and according to this plea, the object of the settlement in which the two bales of cotton were involved, was to arrive at the plaintiff's indebtedness to the defendant.

3. Another ground of the motion is that the court, over objection, permitted the defendant to testify that the communication alleged in the declaration was privileged. The admission of this testimony was clearly improper. A witness cannot be thus permitted to give his opinion as to the law of the case.

4. It is complained that the court instructed the jury as follows: "One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication is not unnecessarily made to others than to those persons whom he honestly believes can assist him in the protection of his own rights, nor to others than those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others intrusted to their guardianship." The error assigned is, that the charge was not qualified by stating that the communication, to become privileged, must be made about the subject-matter to which the person to whom made was to attend. We have examined the entire charge of the court as sent up in the record, and in no part of it is there any reference to this essential feature of a privileged communication — relevancy to the subject-matter on account of which the privilege is claimed. Under the charge the privilege is made to depend merely upon the defendant's good faith and his belief in the relevancy of the statement, and not in any degree upon its actual relevancy. It is a well-settled rule that "a communication, to be privileged, must be spoken with reference to the matter in hand. If the speaker goes further and makes a defamatory charge against a person, such charge having nothing to do with the matter in hand, it is not protected": *Folkard's Starkie on Slander and Libel*,

sec. 329, *285; sec. 308, *269; Odgers on Libel and Slander, *245; Hageman on Privileged Communications, 189. Had the court instructed the jury to this effect, the verdict might have been different; certainly it ought to have been different under the evidence in the record. The verdict, as we have seen, was a special finding in favor of the plea of privileged communication; yet the allegations of the plea are wholly unsustained by the proof in so far as they tend to show the relevancy of the alleged slanderous statement. There is no evidence that the plaintiff's disposing of the two bales of cotton had anything to do with the matter in the settlement of which Turner was to represent the defendant. The defendant testified that his purpose in going to Turner was to get him to aid in arriving at a settlement between himself and Jones, but he does not explain what the settlement was about. Mr. Haygood, the attorney who represented him in the settlement, testified that the agreement was that the defendant and the plaintiff should each "select a man to go down upon the plantation and value the crop," and that the parties selected did this, and "there was nothing said in their report about the two bales of cotton." This accorded with the testimony of the two persons selected by the parties. Turner testified: "All that Lofley and I were to do was to go down to the place and estimate the amount of the crop and the value of it. We went down there and estimated the amount of the crop and the value of the same." Lofley testified: "All Mr. Turner and myself were to do was to go down to the Drumright place and estimate the amount of the cotton and corn there and value it; and then there were nine bales of cotton in Westbrook's warehouse in Montezuma, and we went there and valued that. They told us to value these nine bales of cotton which were in Turner and Westbrook's warehouse, and value the property which we found upon the Drumright place. We had an account there to show what Mr. Jones owed Mr. Forehand, with these items, this nine bales of cotton and this cotton. We were to take the account of Mr. Forehand against Mr. Jones, and go and see how much crop was there, estimate and value it, and also value the nine bales of cotton in the warehouse. That is all we were to do." "Mr. Forehand, as I know of, did not make any claim before us for these two bales of cotton." "That two bales of cotton was not mentioned to us." The testimony above quoted covers substantially all the evidence on this point. It appears, therefore, that the matters

to be settled by these parties did not embrace the two bales of cotton which the plaintiff was charged with having stolen, nor any part of their value, nor any question concerning them. It is clear, then, that the defendant failed to sustain his plea of privilege, and that the verdict is contrary to law and the evidence.

Judgment reversed.

SLANDER — MALICE, WHEN IMPLIED. — Malice is implied from the use of language slanderous *per se*: *Savoil v. Scanlan*, 43 La. Ann. 967; 26 Am. St. Rep. 200, and note; note to *Fresh v. Cutter*, 25 Am. St. Rep. 581; *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 195; extended note to *Terwilliger v. Wands*, 72 Am. Dec. 429; *Jellison v. Goodwin*, 43 Me. 287; 69 Am. Dec. 62; *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96, and note; *Dehoney v. Kaetzl*, 81 Wis. 353.

SLANDER — PRIVILEGED COMMUNICATIONS. — Whether slanderous words uttered are a privileged communication depends upon the circumstances under which they were uttered: *Harris v. Zanone*, 93 Cal. 59; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418, and note. In actions for slander, it is a question for the court whether the statement sued upon, if made in good faith, is privileged: *Fresh v. Cutter*, 73 Md. 87; 25 Am. St. Rep. 575, and note with cases collected.

SLANDER — PRIVILEGED COMMUNICATIONS. — Words spoken by counsel, to be privileged, must have been spoken in the discharge of his duty to his client and have been pertinent to the matter in issue: *Mower v. Watson*, 11 Vt. 536; 34 Am. Dec. 704. An action for slander will not lie against a witness, if what he said was pertinent to the issue: *Cutkins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738, and note. See *M'Millan v. Birch*, 1 Binn. 178; 2 Am. Dec. 426, and note. *Faris v. Starke*, 9 Dana, 128; 33 Am. Dec. 536, and note; also extended note to *Shurtleff v. Stevens*, 31 Am. Rep. 708-715.

RICHMOND AND DANVILLE R. R. Co. v. JEFFERSON.

[89 GEORGIA, 554.]

RAILROADS — DUTY TO PROTECT COLORED PASSENGERS. — A colored passenger upon a railroad train is entitled to the same protection against insults and assaults from drunken passengers as any white passenger. The failure of the conductor to afford such protection when he has power, and knowledge of the necessity for its use, renders the company liable in damages.

CARRIERS — DUTY TO PROTECT PASSENGERS. — A common carrier is obliged to protect his passengers from violence and insult from whatever source arising. While he is not regarded as an insurer of his passengers' safety against every possible source of danger, yet he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make their journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants.

ACTION by a colored passenger against a railroad company to recover for assaults and insults received at the hands of drunken white passengers on a railroad train. Plaintiff recovered a verdict and judgment for one thousand dollars damages. The defendant appealed.

Jackson and Jackson, for the plaintiff in error.

Thomas and Strickland, and Alexander and Lambdin, for the defendant in error.

GOBER, J. The plaintiff in error complains that the verdict is contrary to law and contrary to evidence. Complaint is made, further, that the court erred in giving in charge to the jury the following: "To this end, our law invests conductors of passenger trains with all the powers, duties, and responsibilities of police-officers while on duty on trains. When a person is guilty of disorderly conduct or uses any obscene, profane, or vulgar language in passenger trains, the conductor may stop the train at the place where the offense is committed, or at the next stopping place of said train, and eject such passenger; and the conductor may command the assistance of the employees of the company and of the passengers on the train to assist in such removal, or the conductor may detain a disorderly passenger and deliver him over to the authorities."

The plaintiff, a colored man, was a passenger on defendant's railroad train from Atlanta to Athens; he had paid full fare for a ticket, and was in his proper place; he had complied with all the obligations put upon him by the law to entitle him to be carried to his destination by this defendant. Upon it was the duty of carrying him with extraordinary diligence on behalf of itself and agents, to protect his life and person, though not liable for injuries to the person after having used such diligence. During the course of his journey the plaintiff was insulted, assaulted, and beaten; he was cursed and abused by two drunken passengers. The conductor was appealed to, and refused to interfere; the plaintiff was made to dance and sing; he was subjected to many indignities.

Under the facts, the question presented is a new one in this state. From *Hutchinson on Carriers*, sec. 595, we have: "The passenger is entitled to not only every precaution which can be used for his personal safety by the carrier, but also to respectful treatment from him and his servants. From the

moment the relation commences, as has been seen, the passenger is in a great measure under the protection of the carrier, even from the violent conduct of other passengers or of strangers who may be temporarily upon his conveyance." Sequent is section 596: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law now seems to be well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants."

These men, whose acts are set forth in this record, amused themselves by tormenting and insulting this plaintiff. It seems that the conductor, signaling with a wink, was willing that it should go on; the defendant company, through this representative, forgot for the time that it had this plaintiff's money in its coffers and was under contract and obligation to carry him safely and comfortably. This conductor placed his passenger at the mercy of these drunken brutes, for their distraction and occupation. It would be strange, indeed, if there were no law to extend protection to passengers under such circumstances; it would follow that the good and pure women of this state have no protection on railroad trains beyond what it suits conductors to give them, and that they are subject to the insults of any beast whose liquor and lust combine for an assault. There are few conductors who would see a passenger mistreated; the law says no conductor shall permit it. The postulate of the plaintiff in error demands too much.

This verdict is not contrary to the law and the evidence. There was no error in giving in charge to the jury the law in reference to the police powers of conductors. The statute gives to conductors this power, and, when it is necessary, it is incumbent upon them to make a reasonable use of it. As to the other points, no error appears.

Judgment affirmed.

Assault—Carrier's Duty to Protect Passengers.*

Liability for Assaults by Fellow-passengers.—While a common carrier of passengers is not an insurer of their absolute safety nor of their proper treatment, yet it is liable for their injury or improper treatment received through the violence of a fellow-passenger when such treatment is due to the negligence or willful misconduct of itself or its servants while engaged in executing the contract of carriage. It is the duty of the carrier to treat the passenger properly, carry him safely, and to protect him against any injury from the willful misconduct or violence of his fellow-passengers or strangers, so far as practicable, during the continuance of the contract of carriage. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible in damages: *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827; *Mullan v. Wisconsin etc. Co.*, 46 Minn. 474; *Winnegar v. Central etc. R'y Co.*, 85 Ky. 547; *Sherley v. Billings*, 8 Bush, 147; 8 Am. Rep. 451; *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202-213; 2 Am. Rep. 39; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689; *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190; *Flint v. Norwich etc. Transportation Co.*, 34 Conn. 554; 6 Blatchf. 158; *Hendricks v. Sixth Avenue R. R. Co.*, 12 Jones & S. 8; *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424.

In *Flint v. Norwich etc. Transportation Co.*, 44 Conn. 554, 6 Blatchf. 158, the rule is thus stated: Carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order and guarding those they transport against violence, from whatever source arising, which might be reasonably anticipated or naturally expected to occur, in view of all the circumstances and of the number and character of the persons on board, and under this rule the carrier is bound to protect one passenger from the violence of another. So in *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202, 2 Am. Rep. 39, the court said: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatever source arising; he is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible."

Again, in the well-considered case of *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, it was held that it is the duty of the conductor of a passenger train to preserve order on his train, to protect passen-

* REFERENCE TO MONOGRAPHIC NOTES.

Assault, duty of carrier to protect passenger from: 6 Am. St. Rep. 734-736.

Assault by railroad employee, liability for: 28 Am. Rep. 112, 113; 41 Am. Rep. 340-342; 42 Am. Rep. 36-38.

gers from insult and injury from their fellow-passengers, and, if it is necessary to enable him to discharge this duty, he should stop the train and summon to his aid his fellow-employees on it and such passengers as are willing to assist, and eject from the train any person or passenger guilty of disorderly, insulting, or threatening conduct; and a failure to discharge this duty so far as he has means and power renders the railway company liable in damages to the assaulted or injured passenger. To the same effect is *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190. The result of all the cases is thus summed up in 2 Wood's Railway Law, sec. 313: "Not only is a railroad company or other carrier of passengers bound to exercise proper care to prevent injury to its passengers while upon the premises, in going to or from its trains, but it is also bound to exercise reasonable care and diligence in protecting them from insults or injury from other passengers while riding thereon, as well as from its own servants. It is not held to the same degree of care in this respect as it is held to in the selection of the agencies of its business; but it is bound to exercise that degree of care that a man of ordinary prudence would exercise under similar circumstances in the conduct of his own business. The mere fact that one passenger is injured by an assault committed by another does not of itself constitute even a *prima facie* cause of action; but if it is also shown that the person who committed the injury was improperly admitted upon the train, being drunk and disorderly at the time, or was improperly permitted to remain there, because of his riotous or improper conduct after he got upon the train, the company is liable for all the consequences."

A carrier is bound to use the utmost practicable care to protect its passengers, during the transit, from violence and insults from those on board, including fellow-passengers. A failure to do so renders the carrier liable for any damage naturally and directly resulting therefrom: *Spohn v. Missouri etc. R'y Co.*, 87 Mo. 74; 101 Mo. 417. Although the carrier is not bound to sustain an armed force to protect passengers from sudden and unexpected assaults by strangers or by fellow-passengers, he is bound to provide enough men for the ordinary demands of protection during transportation, and such men are bound in turn to do all in their power to protect and insure the safety of the passenger: *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224. The employees of a railway company constitute the police of the train, and the passenger, from the moment he enters the car, is entitled to look to them for protection in cases of assault growing out of the disorderly conduct of another passenger or other passengers: *Flannery v. Baltimore etc. R. R. Co.*, 4 Mackey, 111. In this respect the conductor of a train has ample powers at his disposal to preserve order in the cars and to expel disturbers of the peace. His official character is a power, and he may stop the train, call to his assistance the other employees thereon and such passengers as are willing to help. Until he has put forth these forces and all others at his command, he has no right to abandon the conflict, and a failure to so exert himself is negligence on the part of the carrier for which it is liable in damages to the passenger assaulted: *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689; *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190.

Every carrier is bound to see that no harm comes to a passenger from a fellow-passenger whose conduct and condition clearly show that he is a dangerous person and likely to injure other passengers: *King v. Ohio etc. R'y Co.*, 22 Fed. Rep. 413. In such case it is clearly the duty of the employees in charge of the train to keep such person in close custody and disarm him, or

remove him from the train. For a failure to perform this duty resulting in injury to a passenger from an assault, the carrier must answer in damages: *Vinton v. Middlesex etc. R. R. Co.*, 11 Allen, 304; 87 Am. Dec. 714; *Railway Co. v. Valley*, 32 Ohio St. 345; 30 Am. Rep. 601; *Lemont v. Washington etc. R. R. Co.*, 1 Mackey, 189; 47 Am. Rep. 238; *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543. Consequently, when the carrier negligently fails in its duty to preserve order and protect a peaceable passenger against riotous and disorderly fellow-passengers, and such passenger is wounded by the careless discharge of a pistol in the hands of one of the turbulent fellow-passengers, it is liable for the injury: *Illinois etc. R. R. Co. v. Minor*, 69 Miss. 710; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689. So, in an action by a civilian passenger to recover damages for injuries inflicted on him by the discharge of a gun dropped on the deck of a passenger steamer by one soldier passenger while struggling with another soldier, the carrier, in absence of proof of the utmost care to protect the injured passenger which the nature of the circumstances would allow, cannot excuse himself by showing that he was compelled to receive the soldiers on board and that they were in charge of officers, especially when he received the plaintiff as a passenger without notice to him of the enforced presence of the soldiers: *Flint v. Norwich etc. Transportation Co.*, 34 Conn. 554; 6 Blatchf. 158.

The general rule is, that the carrier is bound to use and exercise the utmost skill and care of a prudent man in taking precautions to prevent one passenger from being injured by the ignorant, negligent, or reckless acts of another: *Simmons v. New Bedford etc. Co.*, 97 Mass. 369; 93 Am. Dec. 99. The prevailing doctrine is thus stated in the late case of *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9-22; 5 Am. St. Rep. 483. This was an action by a passenger against a railway company to recover damages for an injury caused by a wound from a pistol shot fired by one of a mob attacking a car, which attack might, by ordinary foresight, have been expected; and it was held to be the duty of such common carrier of passengers "to exercise the utmost skill, care, and vigilance to carry the plaintiff safely, and to protect him against any and all danger, from whatever source arising, so far as the same could, by the exercise of such degree of care and vigilance, have been reasonably foreseen and prevented." The court further decided that where, by the exercise of ordinary care, danger to passengers on a train of cars may be anticipated from the attack of a mob of striking laborers upon laborers of another class, taken on board the train, it will be negligence to stop the train at a place not a regular station for stopping and there take on such objectionable laborers, and thus expose other passengers to great peril from a threatened attack, without taking the utmost care and vigilance to prevent injury to passengers. In such case the offensive persons against whom an attack was reasonably to be expected should at least be placed in a car by themselves, where they might protect themselves without danger to the regular passengers, having no notice of the danger, or extraordinary precautionary measures should be taken to prevent the assault of the mob: *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483.

In *Spohn v. Missouri etc. Ry Co.*, 87 Mo. 74-80, the court said: "The officers and employees in charge of railroad trains have the right and power to preserve order and decorum, and to that end may eject all drunken, riotous, and disorderly persons, and all persons violating the reasonable rules of the company. This right and power is everywhere conceded by the courts. From this power, and from the obligations resting upon carriers of persons to transport their passengers safely to their destination, arises a duty to ex-

ercise that power and authority. It is the duty of the railroad company and of its conductor to use the utmost vigilance and care in maintaining order, and in protecting passengers from violence and insults from others, though such other persons be passengers, and a failure to do so will render the company liable for damages to a passenger injured by reason of such neglect."

The introduction of a manifestly intoxicated, quarrelsome, and indecently attired man in a street car by the employees of the car company is an act of negligence for the consequences of which the company is liable. When the conductor admits such person into the car, in response to a statement of the driver that such person is "too full" to ride on the front platform, the negligence is aggravated and unjustifiable, and a verdict against the company for damages for personal injuries sustained by a passenger, from an unprovoked assault by such drunken person under such circumstances will be sustained on the ground of negligence: *Hendricks v. Sixth Avenue R. R. Co.*, 12 Jones & S. 8.

The duty to protect passengers from assaults by fellow-passengers as well as the degree of care and diligence due from the carrier to the passenger to prevent such assaults, seems to be much less in England than is universally recognized in the United States. Thus in *Pounder v. Northeastern Ry. Co.*, L. R., 1 Q. B. 385 (1892), it appeared that the plaintiff had been employed in the eviction of pitmen from their houses, and had thereby incurred the ill-will of the pitmen in the neighborhood in which he was traveling; that when he purchased his railway ticket, the defendant's servants had no notice that he was exposed to greater danger than one of the ordinary traveling public; that before the train started he was threatened, in the hearing of some of defendant's servants, with violence by some of the pitmen at the station, and got into the guard's van for safety, but was removed and placed in a third-class carriage by defendant's servants, who at this time knew that he had been engaged in the evictions and feared violence from the pitmen; that pitmen crowded into the apartment in which he was, thereby greatly overcrowding it; that defendant's servants when applied to by him did nothing toward attempting to get the pitmen out or to get the plaintiff a seat in another carriage; that he was assaulted and injured by the pitmen during the journey to the first station at which the train stopped; that at that station these pitmen got out and others got in and repeated the assaults upon him; that this happened at each station at which the train stopped, and at each station he complained of the assaults to the guard, who did nothing to secure his safety. It was held that there was no evidence of a breach by the defendant of any duty to the plaintiff arising out of the contract of carriage, and that it was not liable. This ruling is directly opposed to the uniform and salutary rule everywhere adopted by the American courts, that the conductor or person in charge of a railway train is invested with all the powers of a peace officer to protect passengers from assault by fellow-passengers or by strangers; that he must exercise such powers earnestly and faithfully; that he must call to his assistance all fellow-employees on the train to aid him in exercising the police power vested in him, and must ask for volunteers from among the passengers for this purpose. If he fails in this duty and one passenger is assaulted by another or by a stranger, the conductor is deemed guilty of negligence and the company must answer for the injury thus inflicted.

The only exception to this rule is in cases where the circumstances are such, from the suddenness of the assault or otherwise, that the conductor,

exercising the utmost care and vigilance, could not have prevented it from occurring.

The rule as to the duty of a conductor on a railway train to protect passengers and to quell disturbances and prevent assaults was forcibly and learnedly laid down in the leading case of *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224. This rule has been uniformly and unanimously adopted and followed in all subsequent cases throughout the United States. In the case referred to, a railway train stopped at a regular station where a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist. They commenced a fight in the cars, in which the plaintiff was injured while a passenger. The court said: —

“If the conductor did not do all he could to stop the fighting, there was negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the fireman, and all the brakemen, and such passengers as are willing to lend a helping hand; and it must be a very formidable mob indeed — more formidable than we have reason to believe had obtruded into these cars — that can resist such a force. Until, at least, he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated by an earnest experiment that the undertaking was impossible.”

In *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, it was decided that a carrier was liable for injuries inflicted on a passenger by a mob, consisting of striking workmen, engaged against non-union men employed at certain iron works, the latter having been taken on the same train and in the same cars with the other passengers, the existence of the mob being known to the carrier, the liability to attack such as might reasonably have been inferred, and the carrier not having taken proper precautions for the protection of the passengers. In the very conservative case of *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, the plaintiff, a passenger on a railway, being assaulted by other passengers, appealed to the conductor for protection. The conductor, after requesting the assailants to desist, became frightened and ran away, making no further attempt to protect the plaintiff. It was held that as the conductor failed to use the means at his command to protect the assaulted passenger, the company was liable for the injury he received. Again, in *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424, a passenger on a railroad train was injured through a disturbance between two drunken passengers. The conductor of the train, who witnessed the quarrel, refused to interfere. This was deemed to be negligence on the part of the company for which it was liable. So, if a passenger on a horse-car is injured by two drunken passengers fighting thereon, through the defendant's negligence in failing to provide a conductor to keep order on the car, and through the driver's negligence in failing to

suppress the fight or eject the fighters or otherwise come to plaintiff's assistance or interfere to preserve order, the company is liable: *Holly v. Atlanta etc. R. R. Co.*, 61 Ga. 215; 34 Am. Rep. 97.

It is the duty of a railroad company to protect its passengers from insult and injury so far as it can, no matter whether such passengers are white, black, or of an inferior race, and if the employees on a train conspire with or allow white passengers thereon to remove or wantonly insult a black or colored passenger who has an equal right to be on the train, or see such passengers eject a fellow-passenger of whatever color or race, and make no effort to prevent it, or any attempt to repair the mischief by restoring him to his seat, the carrier is liable in damages: *Murphy v. Western etc. R. R. Co.*, 23 Fed. Rep. 637; *Britton v. Atlanta etc. R'y Co.*, 88 N. C. 536; 43 Am. Rep. 749.

Passengers in second-class cars are entitled to the same protection from assaults by fellow-passengers as are first-class passengers: *St. Louis etc. R'y Co. v. Mackie*, 71 Tex. 491; 10 Am. St. Rep. 766.

When Carrier not Liable for Assault. — A common carrier is not answerable for the result of a sudden, unlooked for, and violent attack by one passenger upon another, unknown to the employee in charge in time for him to prevent it, although the assailant was drunk, and had been guilty of insulting language, but had remained quiet after being spoken to by the person in charge: *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190.

If a passenger is violently assaulted by a fellow-passenger while the conductor is absent attending to his duties in another part of the train, not knowing of the assault or that it was threatened, the carrier cannot be held liable therefor: *Royston v. Illinois etc. R. R. Co.*, 67 Miss. 376. Nor is the carrier liable for injuries caused during a fight between a mob, which, at a station, rushed upon the cars in such numbers as to defy the power of the conductor to resist: *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224. Nor is a railroad company liable in damages to a female passenger on account of vulgar and profane language, indecent exposure of person, or other disorderly conduct by intruders at a station, of which conduct the carrier did not know nor have reason to apprehend: *Button v. South etc. R. R. Co.*, 77 Ala. 591; 54 Am. Rep. 80.

When a quarrel and assault by one passenger upon another in the presence of a conductor of a railway train is sudden, unexpected, and without warning, and the conductor exercises all power at his command to separate the combatants as promptly as the circumstances will permit, the company is not answerable for any injury resulting from the assault: *Mullan v. Wisconsin etc. R'y Co.*, 46 Minn. 474.

A carrier of passengers is not liable when the assaulted passenger carries articles of great value upon his person without notice to the carrier, and they are violently taken by robbers, who make a sudden attack upon him: *Weeks v. New York etc. R. R. Co.*, 72 N. Y. 50; 28 Am. Rep. 104.

Liability for Assaults by Servants. — A common carrier, whether by steamboat, railway, or otherwise, is under obligation to convey his passenger safely and properly and to treat him respectfully. If he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute it. Hence the carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or service or not, if done during the course of the discharge of his duty to the master which relates to the passenger. For he owes him, as before stated, not only carriage, but protection also, and if he furnishes a servant

who, instead of protecting, insults, or assaults, or beats the passenger, he has directly failed in his duty to the passenger. As a consequence of this rule the cases everywhere agree that the carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but also against the violence and assaults of his own servants. If this protection is not afforded, and he, while he still remains a passenger, is assaulted and beaten by the carrier's servant, the carrier is answerable for the injury, although the servant was not acting strictly within the line of his employment and his act was not expressly or impliedly authorized by the master: *Euls v. Metropolitan R'y Co.*, 43 Mo. App. 537; *Pendleton v. Kinsley*, 3 Cliff. 416; *Thompson on Carriers of Passengers*, 352; *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311; *Chicago etc. R. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33; *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202; 2 Am. Rep. 39; *Sherley v. Billings*, 8 Bush, 147; 8 Am. Rep. 451; *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Craker v. Chicago etc. R'y Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Mulligan v. New York etc. R'y Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539; *Palmeri v. Manhattan R'y Co.*, 133 N. Y. 261; *King v. Illinois Central R. R. Co.*, 69 Miss. 245; *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Seymour v. Greenwood*, 7 Hurl. & N. 355. The rule is thus stated in *Hutchinson on Carriers*, sec. 595:—

“The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. But as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, by the vindictive feelings of the servant toward the passenger. And it would seem, according to some of the cases, that the carrier may be held responsible even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty; and that the fact of his being in the employment of the carrier, and engaged in the prosecution of his business upon his vessel or vehicle, will make the malicious and unauthorized attack of the servant upon the passenger a breach of duty for which the carrier himself may be held liable.”

In the leading case of *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202, 2 Am. Rep. 39, the court in delivering the opinion said:—

“It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source

of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible."

These expressions were approved in *Missouri etc. R'y Co. v. Weaver*, 16 Kan. 456, where the court further said: "The carrier selects his own servants, and unless he finds that violence and abuse on the part of such agents toward his passengers meets with swift and severe punishment, he will soon become indifferent to the character and conduct of such agents, and rudeness, insult, and violence will take the place of politeness, courtesy, and assistance. Any one who travels sees so much of rudeness and inattention on the part of employees, is subjected to so many annoyances, petty and large, and not seldom is witness to so much actual outrage and abuse, that we would be exceedingly loath to have any relaxation of the rule which holds carriers to the most rigorous accountability for violence and wrong to their passengers."

The language used in *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202, 2 Am. Rep. 39, has been approved in many cases, as in *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451, where a deck passenger upon a steamboat, after having paid his fare, was assaulted and beaten by the clerk to whom he had immediately before paid it, for the alleged reason that he had been secreting himself under the boilers of the boat. The carrier was held responsible for the act of his clerk and compelled to pay damages for the injuries, including the loss of an eye suffered by the passenger. In its opinion the court said: "It must be borne in mind that from the moment the contract between the carrier and the passenger begins until it ends the official actions of the officers of the boat touching the payment of passage money or the manner in which the passengers shall conduct themselves, or the enforcement of the regulations prescribed for the government of the vessel — in short, all intercourse between the officers and passengers naturally and legitimately growing out of the relationship existing between them — may properly be said to come within the course of their employment, and their actions in the premises, if legal and proper, are within the scope of their authority." A carrier by water is liable for a wrongful assault upon a passenger by the mate of the vessel, although the carrier did not authorize the act of his employee: *Springer Transportation Co. v. Smith*, 16 Lea, 498. In another case, the owners of a steamboat were made liable for the battery of a passenger by the steward of the vessel and his assistants, growing out of a dispute as to whether or not another passenger, whose cause the plaintiff espoused, had paid for his dinner: *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311.

In *Chicago etc. R. R. Co. v. Fleznan*, 103 Ill. 546, 42 Am. Rep. 33, a carrier by railroad was held liable when a brakeman struck a passenger in the face with a lantern, because the passenger, who had lost his watch, said he thought the brakeman had it. The court in delivering the opinion said: "So too the contract which existed between appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts toward

passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employee a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger."

A street railway corporation was compelled to pay damages when the driver of one of its cars maliciously assaulted a passenger because the latter expostulated with the driver about an assault made by the latter upon another person outside the car: *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185. In this case the court said: "By the defendant's contract with the plaintiff it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servant while engaged in performing a duty which the carrier owes to the passenger."

In *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 3 Hun, 329, 21 Am. Rep. 597, the court said: "It is, in general, sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case, will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another." These remarks were approved in the subsequent case of *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170, and the doctrine applied in many other cases, as where a railway brakeman made a malicious assault upon a passenger who had attempted to enter the wrong car: *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; or where a conductor wrongfully assaulted a passenger upon his train: *Western etc. R. R. Co. v. Turner*, 72 Ga. 292; 53 Am. Rep. 842; *Gasway v. Atlanta etc. R. R. Co.*, 58 Ga. 216; *Illinois Central R. R. Co. v. Sheehan*, 29 Ill. App. 90; or when the porter of a sleeping-car committed such assault: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417; 8 Am. St. Rep. 538. The servants in charge of the car are considered, for the purposes of the contract between the railroad company and the passenger, as the servants of the carrier: *Pennsylvania Co. v. Roy*, 102 U. S. 451.

A railroad company is liable for an assault and battery by the conductor of one of its trains upon a passenger, in seizing or attempting to seize his property to enforce the payment of his fare: *Ramsden v. Boston etc. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200. And the company is responsible for a battery by its conductor committed first on the car and repeated shortly afterward at the office of the company, where the passenger had gone to make complaint to the superintendent: *Savannah etc. R. R. Co. v. Bryan*, 86 Ga. 312; 22 Am. St. Rep. 464.

When the conductor or employees on a railroad train act maliciously and wantonly in using insulting or abusive language to a passenger or use force

and violence in striking and injuring him, or unnecessary force in ejecting him from the cars, whether rightfully or wrongfully, such servant acts in relation to these matters in the prosecution and within the scope of his business and employment, and the company is liable for the injury received in consequence of such assault by the servant, even though it was voluntarily done: *Western etc. R. R. Co. v. Turner*, 72 Ga. 292; 53 Am. Rep. 842; *Christian v. Columbus etc. R'y Co.*, 79 Ga. 461; *Hinckley v. Chicago etc. R'y Co.*, 38 Wis. 194; *Belknap v. Boston etc. R. R.*, 49 N. H. 358; *Crocker v. New London etc. R. R. Co.*, 24 Conn. 249; *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98; *Indianapolis etc. R'y Co. v. Anthony*, 43 Ind. 183; *Pittsburgh etc. R. R. Co. v. Theobald*, 51 Ind. 246; *American Express Co. v. Patterson*, 73 Ind. 430; *Chicago etc. R'y Co. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *North-western R. R. Co. v. Hack*, 66 Ill. 238; *Travers v. Kansas etc. R'y*, 63 Mo. 421; *Brown v. Hannibal etc. R. R. Co.*, 66 Mo. 588; *Quigley v. Central Pacific R. R. Co.*, 11 Nev. 350; 21 Am. Rep. 757; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; 8 Am. Rep. 78; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Missouri etc. R'y Co. v. Weaver*, 16 Kan. 456.

In all cases where a railway employee uses undue force in ejecting a passenger from the cars and commits an assault and battery upon him, the company is liable in damages: *Winnegar v. Central etc. R'y Co.*, 85 Ky. 547; *Coleman v. New York etc. R. R. Co.*, 106 Mass. 160; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Holmes v. Wakefield*, 12 Allen, 580; 90 Am. Dec. 171; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83; *North Chicago etc. R'y Co. v. Gastka*, 128 Ill. 613; *Gulf etc. R'y Co. v. Kirkbride*, 79 Tex. 457; *Bayley v. Manchester etc. R'y Co.*, L. R. 7 Com. P. 415.

The cases cited above generally maintain that the party injured by an assault inflicted by the servant of a carrier is entitled to recover exemplary damages against the latter, and this doctrine is announced in the additional cases of *Atlantic etc. R'y Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Springer Transportation Co. v. Smith*, 16 Lea, 498; *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202; 2 Am. Rep. 39; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Savannah etc. R. R. Co. v. Bryan*, 86 Ga. 312; 22 Am. St. Rep. 464. As before shown, the great majority of the cases declare that the carrier is to be held responsible in exemplary damages for the willful, wanton, and malicious act of his servant which constitutes an assault and a breach of the contract of carriage, and it would as a consequence seem to be unnecessary to consider whether or not at the time the unlawful act was committed the servant was acting within the scope of his employment and according to the instructions of his master, and also as to whether or not the act was in any manner subsequently ratified by the latter.

There are a few cases, however, which do not go to the extent of declaring that the carrier is liable for the willful misconduct and assault by his servant when his act may be considered as outside the legitimate scope of his duties; though if the act could be imputed to the carrier personally, it would amount to a breach of the contract for safe carriage. Thus, in *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418, the plaintiff, a passenger upon a street car, desiring to alight, passed out upon the platform and asked the conductor to stop the car, and refused to get out until the car had come to a full stop. Thereupon, and when the car was in motion, he threw the passenger from the car, breaking her leg when she struck the

pavement, and it was decided that the act of the conductor was a wanton and willful trespass, not in the performance of any duty to or of any act authorized by the defendant, and that the latter was not liable. This case is plainly irreconcilable with many subsequent New York cases in which a contrary conclusion was reached upon almost identical facts. See *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185; *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611, and other New York cases before cited in this note. In a Missouri case based upon similar facts, the following expression is found: "If the conduct of this driver were willful and malicious, with intent to injure the plaintiff, he might be liable to indictment for an assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of willful and malicious trespass. The company was answerable only for his negligence or his incapacity or unskillfulness in the performance of the duties assigned to him": *McKeon v. Citizens R'y Co.*, 42 Mo. 79. This dictum has long been overruled in that state, as is shown by *Spohn v. Missouri etc. R'y Co.*, 87 Mo. 74; 101 Mo. 417, where a contrary conclusion is reached upon similar facts, and to the same effect is *Malecke v. Tower Grove etc. R'y Co.*, 57 Mo. 17.

In *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373, it appeared that an altercation occurred between the passenger and the baggage master of the railroad, resulting in an attack by the latter upon the passenger with a hatchet, from which he received serious injury; and it was held that the assault was not in the course of the business of the servant, and that the carrier could not be held liable. This case fails to cite and seemingly totally ignores the great mass of cases maintaining a contrary doctrine.

In *Central R'y Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, the driver of a street car used insulting language to a passenger, who replied that when they got to the office of the company he would report him. When the car got within a block of such office the passenger left the car and started toward the office, intending to report the driver and then return to the car and continue his journey. He did not inform the driver of his intention to return to the car. The driver, on seeing the passenger going toward the office, got off the car, intercepted the passenger, and severely beat him with an iron brake. It was determined that the plaintiff had ceased to be a passenger, that the driver was not acting in the line of his duty, and that the carrier was not liable for the assault. But in a very similar case, where the conductor first assaulted the passenger on the car and then followed him to the office of the carrier, where he had gone to make complaint, and again assaulted him there, the carrier was held liable for both assaults, the conductor being deemed to be acting on both occasions as an employee, violating the duty which the carrier owed to the plaintiff as a passenger: *Savannah etc. R. R. Co. v. Bryan*, 86 Ga. 312; 22 Am. St. Rep. 464.

Liability for Arrests Made by Servant. — When the servant of a common carrier is not given express authority to arrest passengers, an arrest made by such servant is generally considered to be entirely beyond the scope of the employment of such servant and unconnected with any duty which the carrier owes to the passenger. As a result, it has been frequently decided, both in this country and in England, that in the absence of authority in the by-laws of the carrier, and directions to its servants to execute arrests of passengers when deemed necessary, the arrests which the employees of a carrier may

happen to make while engaged in their duties cannot be considered within the scope of their employment, and therefore, in case the arrest is unjustifiable, no resort can be had to the carrier for damages: *Porter v. Chicago etc. R. R. Co.*, 41 Iowa, 358; *Lafitte v. New Orleans etc. R. R. Co.*, 43 La. Ann. 34; *Cunningham v. Seattle etc. R'y Co.*, 3 Wash. 471; *Mulligan v. New York etc. R'y Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539; *Edwards v. London etc. R'y Co.*, L. R. 5 Com. P. 445; L. R., 6 Q. B. 65; *Poulton v. London etc. R'y Co.*, L. R. 2 Q. B. 534; *Goff v. Great Northern R'y Co.*, 3 El. & E. 672.

Liability for Assaults by Servant on Female Passenger. — A common carrier, whether by railroad, vessel, or otherwise, is bound to protect female passengers from all indecent approach or assault on the part of its servants. Therefore, when the conductor on a railway train makes an indecent assault on a female passenger, the company is liable in compensatory damages under the principle that a master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person assaulted: *Craker v. Chicago etc. R'y Co.*, 36 Wis. 657; 17 Am. Rep. 504.

The contract of all passengers entitles them to respectful treatment from those in charge of a sea-going vessel, and in respect to female passengers includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest approach. As a consequence a carrier is liable for an attempted rape by one of its servants upon a female passenger: *Nieto v. Clark*, 1 Cliff. 145. This rule was applied in *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600.

If a porter on a Pullman palace car makes an indecent assault on a lady passenger, she is entitled to recover from the company having charge of the car a fair pecuniary compensation for all injury, temporary or permanent, directly caused to her in her person, health, and strength, including compensation for the pain and suffering, mental and physical, which has been or thereafter may be caused by such assault: *Campbell v. Pullman Palace Car Co.*, 42 Fed. Rep. 484.

Not Liable for Assault Provoked by Person Injured. — When a passenger upon a railroad, by his own improper and insulting behavior, brings upon himself an assault by a servant of the carrier, the latter cannot be held responsible for the injuries inflicted as a result of the encounter: *Scott v. Central Park etc. R. R. Co.*, 53 Hun, 414.

SWIFT v. TATNER.

[89 GEORGIA, 660.]

PART OWNERS OF SHIPS — RIGHTS AND LIABILITIES. — The majority owner in a ship is entitled to its possession and management, and the minority owners, unless they expressly dissent, are bound by his acts. He represents them as their agent, they having the right and duty to share ratably in the profits and losses of the joint enterprise.

PART OWNERS OF SHIPS — RIGHTS AND LIABILITIES. — The minority owners in a ship can avoid liability and loss in any particular venture entered into by the majority owner from which they expressly dissent by requiring him to give bond for the safe return of the ship.

PART OWNERS OF SHIPS — RIGHTS AND LIABILITIES. — The minority owners of a ship, unless they dissent from, are presumed to agree to, the voy-

age contracted for by the majority owner and to all the liabilities occasioned by it. The burden is on them to show their dissent and consequent non-liability.

SHIPPING — CONSTRUCTION OF CHARTER-PARTY. — When it is doubtful on the face of a charter-party whether or not it was intended to clothe the charterer with ownership in the ship, the presumption is against such intention. As between the two possible constructions, the law inclines to a contract of affreightment rather than a contract of ownership or lease of the ship.

SHIPPING — CONSTRUCTION OF CHARTER-PARTY. — When a charter-party contains only matter of contract, stipulating that the ship shall, within a certain time, perform certain voyages with specified cargoes and the captain make proper delivery thereof, freight in a fixed sum to be paid each trip, upon delivery of the cargo in the charterer's port; reserving a lien for freight on the cargo in favor of the captain or owners, and sufficient room in the ship for tackle, officers, and crew; and providing that the ship shall carry on any outward trip lumber or such cargo as the charterer desires free of freight charge, the charterer not undertaking to man or victual the ship, or to bear any risks or expenses of the voyage, constitutes a contract of affreightment, and not a lease of the ship, and the master is the servant of the owner thereof, and not of the charterer of the ship.

SHIPPING — RIGHT OF MASTER TO WAGES DURING DETENTION. — When the master of a ship is in the service of its owners, whose duty it is to immediately release the ship when seized under legal process against them, he may recover his wages from them during the time that the ship is detained by such seizure without his fault, unless his contract stipulates to the contrary.

SHIPPING — RIGHT OF MASTER TO UNCOLLECTED FREIGHTS. — When the master of a ship fails in his duty to collect of the charterer freights in which he has an interest and for which both himself and the ship-owner have a lien upon the cargo, he cannot hold the owner liable for his interest in such uncollected freights unless the owner interfered to prevent payment by the charterer.

SHIPPING — RIGHT OF MASTER TO RECOVER FOR DETENTION — PLEADINGS AND PROOFS. — When a ship is detained by reason of an attachment against several persons as joint owners, and the master of the vessel sues all the defendants in the attachment for his wages and loss caused by such detention, he must establish the joint ownership as alleged in order to recover, although the defendants replevied the ship after its seizure under the attachment. Under the statute no admission of ownership or interest in the ship can be implied from the mere act of replevying it.

PLEADING. — **THE GENERAL ISSUE** puts the plaintiff on proof of every material averment of his complaint. There being no evidence to uphold the action as against some of the defendants, all charges of the court based upon the theory that there was such evidence were erroneous.

Denmark, Adams and Adams, for the plaintiff in error.

R. R. Richards and D. Griffin, for the defendants in error.

SIMMONS, J. A ship belonging to several owners in common was chartered by one of them, who owned a majority of

shares, to a merchant to sail between specified ports during a term not to exceed six months. It was arranged between owner, charterer, and master that the charterer should pay a certain amount of freight upon the completion of each return voyage and delivery of the cargo in the charterer's port, of which amount the master should receive two thirds, to reimburse him for expenses of manning and victualing the ship, etc., and to pay for his services as master, the remaining third, less expenses for repairs, etc., to go to the ship, that is, the owners. Part of this arrangement was embodied in the charter-party, and a part of it appeared in the oral testimony introduced on both sides. Pending the performance of the charter-party the ship was seized in the charterer's port under an attachment for a personal debt of the majority owner, and not being replevied by him or the other owners, was detained, and thus prevented from making one or more voyages in pursuance of the contract. The master now sues all the owners in an attachment levied on the ship for damages on account of being prevented by the first attachment and failure to replevy from making voyages which he could have made had the ship been free, and also for his expenses and wages during the delay, and for his share of the charter money of one voyage actually made, which he alleges that the owners prevented him from collecting.

1. The first question respects the liability of those owners who did not join in the charter-party or the collateral agreement with the master. The court charged the jury thus: "If you find from the evidence that Tatner had an arrangement with Swift, as the managing owner, whereby he, Tatner, was to represent the vessel and owners under certain circumstances and for certain purposes, and if you find that the other owners made no objection to this arrangement, and that they received the charter money or any portion of it without objection, then this arrangement would be just as binding upon them as upon Swift, and whatever Tatner was authorized to do under his arrangement with Swift would be equally binding upon all of the owners." "Hence the question is . . . whether Tatner has a claim against Swift and the other owners of the vessel; if he has, then his claim extends to all of those whom you find to be owners of that vessel." It is complained that these instructions were erroneous, and also that the court failed to instruct with reference to the defendants' contentions that there was no privity between them and the

master; that none of them, except Swift, could be liable on account of the ship's detention under the attachment, they being not liable for the debts of Swift or for the action of his creditors, over which they had no control; and that they were not liable for the breach of the charter-party or the acts of Swift, or for the wages of the master. It may be observed that, if special instructions were desired as to the different defendants who were making a common defense, they ought properly to have been requested; but since the charges given were excepted to, and as there is to be a new trial for another reason, it is well to state the principle governing the liability of the minority owners. Swift testified that he owned thirty-nine sixty-fourths of the ship at the time of the charter. He was thus a majority owner. The rights of a majority owner are very large. It is to the interest of all the owners and of the public that the vessel be kept in trade, and not be forced to lie idle because the owners may not agree on her employment; therefore, the majority owner is entitled to the possession and management of the ship, and the minority owners, unless they expressly dissent, are held to acquiesce in and be bound by the acts and doings of the majority owner. He represents them as their agent, they having the right and duty to share ratably in the profits and losses of the joint enterprise. He does not need their express authority in order to bind them, but they need to expressly withdraw their authority in order not to be bound. They can avoid liability and loss in any particular venture of which they do not approve, by requiring the majority owner to give bond for the safe return of the ship: Abbott on Shipping, 13th Eng. ed., 85 et seq., 90 et seq.; Carver on Carriers by Sea, 40; 1 Parsons on Shipping and Admiralty, 95, 97; Desty on Shipping and Admiralty, secs. 36, 37, 47; 23 Myer's Federal Decisions, sec. 1166 et seq. Thus the minority owners, unless they dissent from, are presumed to agree to the voyage and all the liabilities occasioned by it, and the burden is on them to show their dissent and consequent non-liability when it exists.

Under this principle, it may be said, in a general way, that the minority owners of the ship in question are bound by the charter-party and by any agreement which the majority owner may have made with the master for his employment and compensation, and by any acts or omissions of the majority owner which affected or determined the performances of the ship. This is certainly true of those who were owners at the time

the contract was made, and they could not divest themselves of liability by parting with their interest in the ship, unless, perhaps, the credit were given entirely to the ship; for a party cannot thus shift his contract on to another to whose responsibility the opposite party might not be able or willing to trust.

As to owners who became such after the contract was made, the evidence furnishes only one example, the defendant Adams. He figures first as the assignee in bankruptcy of Swift, and afterward as owner of the ship. In the former capacity he received one payment of the ship's share of the charter money and became so connected with her subsequent detention as to gain a knowledge of all the circumstances. When he afterward acquired his interest, whatever it is, he had notice of the outstanding engagement of the ship and of the liability of the owners to make good the time lost by the delay. Besides, the jury might be warranted in finding from his admissions in the letter of February 20, 1890, in which he said he was then sole owner, and in the letter of February 26th, in which he said he owned fifty-nine sixty-fourths of the vessel and was more interested than any one to have the vessel clear, and from other correspondence and all the circumstances, that he was owner for part of the time of delay and was actually responsible to some extent for the tardiness with which the bond was given and the ship released. Indeed, he seems to have been the chief actor on the owner's side all through the complication which detained the ship, but how long as assignee of Swift and how long as owner is not clear. There may be little doubt that one who was part owner at the time of the occurrence causing the damage sued for would be represented by the then majority owner, or the managing owner, and liable for his acts and defaults touching the operation of the ship, and one buying after the breach of contract might be bound for the damages, at least to the extent of his interest in the ship; but it is not intended to rule these questions now, because the evidence does not show when the defendants, with the exception of Swift and Adams, acquired their interest, or that they ever had any at all. If either party desired a decision on these points, he ought to have shown when the various defendants acquired their ownership. The court below could not properly charge on mere assumptions, nor can exceptions for review be predicated on a purely hypothetical state of facts.

2. One of the principal questions argued before us was,

whether the master in this case was in the service of the owners or of the charterer, and as helping to solve that question, the charter-party was claimed by the defendants to be a lease of the vessel to the charterer whereby he acquired entire possession and control of her navigation, thus becoming the owner *pro hac vice*, while the plaintiff claimed that it was only a contract of affreightment by which the owners did not transfer possession and ownership *pro tempore* to the charterer, but retained control of the ship's navigation. In deciding which contention is correct, the contract, where it does not speak conclusively, may be construed in the light of maritime custom. In the first place, the master is usually employed by the owners and is their servant or agent; and so if the charterer in this case did not become owner, there would be a presumption that the master was employed by Swift: *Fenton v. Dublin Steam Packet Co.*, 1 Perry & D. 103. Again, leases or demises of the ship are rare in comparison with contracts of affreightment. The law deems it imprudent for an owner to surrender the management of his ship to a charterer. Hence, if it is doubtful on the face of the charter-party whether it was intended to clothe the charterer with ownership, the presumption is against such an intention. As between the two possible constructions, the law favors and inclines to the contract of affreightment: Abbott on Shipping, *289; Desty, Shipping and Admiralty, sec. 204; *The Aberfoyle*, Abb. Adm. 242; *Certain Logs of Mahogany*, 2 Sum. 599; *Hagar v. Clark*, 78 N. Y. 45; *Reed v. United States*, 11 Wall. 591; *McGilveray v. Capen*, 7 Gray, 523.

Keeping the presumptions in mind, the terms of the charter-party may now be looked to. The first indication of a retention of ownership by the owners is that there are no words of lease or transfer. It is merely stipulated that the vessel, whereof A. W. Tatner is master, shall render certain services. "The whole instrument contains matter of contract and covenant only": *Saville v. Campion*, 2 Barn. & Ald. 503; *Sandeman v. Scurr*, L. R., 2 Q. B. 86; *The Aberfoyle*, Abb. Adm. 242; *The Volunteer*, 1 Sum. 551; *Hagar v. Clark*, 78 N. Y. 45. In view of the presumptions and the context, it must be the owner who stipulates that "the vessel shall proceed to Portland and load lumber for Baracoa and from there load fruit for Savannah," etc.; that "the vessel being so laden, Captain A. W. Tatner shall with all possible dispatch make sail for the port of Savannah and there make a true and faithful de-

livery of the cargo," etc. By stipulating for its performances the owner evinces the intention of running the ship himself, that is, of keeping control. After agreeing to deliver the cargo, the contract proceeds: "In consideration whereof, freight shall be paid on unloading and right delivery of the cargo at Savannah in the sum of \$650 per round trip, charter money being payable each trip upon delivery of cargo." Note that the compensation termed "freight" is payable on delivery of the cargo in the charterer's port. It would be senseless for either party to contract with the other that the charterer should deliver the cargo to himself. The sense of it is that the charterer pays the freight when the owner delivers the cargo, this delivery being a condition precedent of receiving the charter money. All this shows that the owner meant to retain ownership and control: *Abbott on Shipping*, *291; *Campion v. Colvin*, 3 Bing. N. C. 17; *Certain Logs of Mahogany*, 2 Sum. 599; *The Nathaniel Hooper*, 3 Sum. 544; *Hoe v. Groverman*, 1 Cranch, 214; *McGilvery v. Capen*, 7 Gray, 523. Moreover it is agreed that "the captain or owners of the vessel shall have an absolute lien on the cargo for all freight, dead freight, and demurrage, average, and other charges." This reservation of lien comports much better with the retention than with the resignation of possession by the owner. If the master navigating the ship was to be the servant of the charterer, how could the master have any such lien, and would not the owner's lien be, if not impossible, at least practically ineffectual? That the captain or owners shall have the lien, indicates that both these parties are opposed in interest to the charterer. Again, it is provided that the vessel shall load certain cargoes "which shall not exceed what she can reasonably stow and carry over and above her tackle, apparel, provisions, and room sufficient for the accommodation of the officers and crew." This reservation of space in the ship is another indication that the owner's possession continued: *Saville v. Campion*, 2 Barn. & Ald. 503; *Gilkison v. Middleton*, 2 Com. B., N. S. 134; *Omoa etc. Coal Co. v. Huntley*, L. R., 2 C. P. D. 464; *The Aberfoyle*, Abb. Adm. 242; *The Volunteer*, 1 Sum. 567; *The Nathaniel Hooper*, 3 Sum. 544; *Clarkson v. Edes*, 4 Cow. 470; *McGilvery v. Capen*, 7 Gray, 523; *Hagar v. Clark*, 78 N. Y. 45. It is further stipulated that the vessel "shall carry on any outward trips lumber or such other suitable cargo as charterer may desire free of freight charge." This evidently means that the owner will carry such cargo

without charge. For, if the ownership was *pro tempore* in the charterer, it would be unnecessary for him to guard against any liability to pay freight on an outward voyage; he could not be made to pay for carrying his own cargo in his own ship. There is nothing in the contract to show that the charterer was to employ and pay the master and crew. From this it would be implied that the owner had it to do: *Hagar v. Clark*, 78 N. Y. 45. But the owner expressly represents that the vessel already has a master in the person of Tatner, and that she is "in every respect fitted for the intended voyage." This could not be true unless she were properly manned. Indeed, it may be said that a vessel is not seaworthy without a proper complement of officers and crew: Carver on Carriers by Sea, sec. 18. The services of an intelligent and adequate force to manipulate the ship are certainly necessary for her safe navigation.

Under the contract, then, the owner was bound to provide the master and crew. Tatner testified: "I went with my crew all ready to take charge of the vessel, got the vessel ready for sea, and had the charter-party signed." Also: "An agent or owner of a vessel will not charter his vessel unless he knows who the captain is that is to have charge of her. It is customary, in cases of time charters like this, for the captain to man and victual the vessel and collect all the charter money, and take his share out and remit to the owners their share. . . . I saw Mr. Swift and asked him for the vessel; he inquired if I wanted her, and I replied that I did; and he said that 'if you will go master of her I am willing to put her in the fruit trade.' " Also, that, as master in charge, he represented the vessel and owners. The testimony of Swift does not harmonize with the charter-party, and is contradicted by Tatner and Collins both. Swift said, after naming the amount of the charter money: "From that amount Collins was to pay the owners of the Leon S. Swift one third clear. The other two thirds he was to reserve to pay his captain (Tatner) and his crew, and for victualing the vessel. Neither myself nor the other owners of the vessel had anything to do with appointing or employing Tatner; he was appointed and employed by Collins. . . . J. S. Collins employed the crew of said vessel during time said charter-party was in operation, and he paid them. Collins paid for and was to purchase all provisions for officers and crew, and also supplies for the vessel, and to defray its running expenses: all the owners

were to pay for was sails, rigging, painting, and generally keeping the schooner in order." Collins testified: "Of course we cannot charter a vessel from an owner without getting some one as master who is experienced in the fruit trade and who will therefore be acceptable to the owners. . . . I had nothing to do with employing the crew or victualing the vessel. I paid the charter money as stated, and out of that the captain for his share manned and victualed the vessel." All agreed that Tatner had originally gone forth for Collins in search of a vessel. But the charter-party being the best evidence of the relation of the master to the other parties in the arrangement, it all amounts to this, — that Tatner was acceptable to the owner as well as to the charterer, and was adopted as master by the former, and consequently was in the service of the owner or owners.

3. Having determined that the master was in the service of the owners, the next question is, Ought he to recover from them the damages he sustained by the detention of the ship under the attachment issued against the majority owner? When the ship was seized under legal process it became the duty of the owners at once to release her by giving the requisite bond and security. It seems that the master as such would have no right to give the bond and thereby bind the owners, at least where it is practicable for him to communicate with them: See *Gager v. Babcock*, 48 N. Y. 154; 8 Am. Rep. 532; *Mitchell v. Chambers*, 43 Mich. 150; 38 Am. Rep. 167. Consequently, the master having notified the majority owner at once of the ship's seizure, it was not the master's duty to replevy her. The charterer was not obliged to do so, in the absence of a contract requiring it. The owners, by undertaking that the ship should go, contracted that she should be free to go. There was a sort of warranty that she should not be detained by circumstances which they could control. Indeed, there is some authority that an absolute undertaking of this sort will not be discharged by a supervening impossibility; but it is not necessary in this case to go so far. The seizure under the attachment was not such *vis major* as to excuse the owners from performing their contract: See *Van Beuren v. Wilson*, 9 Cow. 158; 18 Am. Dec. 491.

They do not show, or even claim, that they were unable to give the necessary bond, nor do they offer any explanation of the delay to do so. It may therefore be assumed that they or some of them were able to replevy the ship, and they cannot

plead impossibility by act of the law as releasing them from liability. Indeed, it may be doubted, if they were unable to replevy the ship, whether that would be any excuse, since the necessity was brought on by the act or omission of the majority owner. If the majority owner failed to give the bond, then the other owners, in order to avoid the consequences, ought to have come up and given it. While the ship was being detained, the charterer was urged to replevy her, and a witness or two expressed the opinion that it was his duty to do so; but while the charterer might have done so, perhaps, to save himself from loss, it was not incumbent on him to take a burden and risk which his contract did not put upon him. We think that the master, being without blame for the delay, is entitled to recover of the owners. The contract with him provided that he should get two thirds of the charter money of each voyage and bear the expenses of manning and victualing the ship. This was nothing more than a convenient mode of meeting these expenses and providing compensation for his services. Sometimes a master who is to get a share of the profits will hold the relation of partner to the owners, sometimes being owner for the voyage himself. However, "the cases are numerous which show that the taking a vessel by the master, victualing and manning her, and paying a portion of the port charges and having a share of the profits, do not of themselves constitute him the owner *pro hac vice*. . . . The expense of victualing and manning the vessel and receiving compensation for his services and disbursements in a share of the profits by the master are by no means inconsistent with the right of the employer or owner to have the general direction of the business in which she is engaged": *Lyman v. Redman*, 23 Me. 289, 295; *Latham v. Lawrence*, 13 Conn. 299; *Sims v. Howard*, 40 Me. 276; *Arthur v. The Cassius*, 2 Story, 81; *The Nathaniel Hooper*, 3 Sum. 544; *Harding v. Souther*, 12 Cush. 307; *Steel v. Lester*, L. R., 3 C. P. D. 121. Under these authorities the arrangement disclosed by the charter-party and the testimony in this case did not make the master owner for the voyage or voyages, but was only a contract for his wages as master; and unless his contract so stipulated, his right to wages would not be extinguished or suspended by a detention of the ship without his fault, and a failure of the owners to allow him to go on performing his services, he being ready and offering to do so.

4. The evidence shows that the charter money for one voy-

age was never paid over, but was retained by the charterer. The charterer said his reason for retaining it was twofold: 1. Because he had been notified by Adams not to pay it over to Tatner; and 2. Because he thought he had a lien on it for his damages by reason of the attachment of the ship. Adams denied giving any such notification, but Tatner said Collins, the charterer, would not pay because Adams had notified him not to. The charter-party gave the captain and owners a lien on the cargo for the charter money or freight, and Tatner could have retained the cargo until the freight was paid. If he chose to surrender the cargo without requiring the payment of the freight, then his intention was to credit the charterer, and he thereby waived any claim he might have had against the owners for his interest in the freight money of that voyage; and so long as it remained uncollected by the owners, he could not recover his share from them; but, of course, if the owner interfered to prevent payment to the master or influenced the charterer to refuse payment, then the owner would be a party to such refusal, and liable accordingly.

5. A number of the defendants were not shown to have any interest in the ship at any time, though the verdict and judgment was general against all the defendants. The defendant in error contended that the jury could base their finding on the fact that all the defendants joined in the replevy bond and in the defense to the action. As concerns the bond, our attachment law gives to defendants the right to replevy regardless of any interest of theirs in the property attached. Consequently no admission of ownership or interest in the property can be implied from the simple act of replevying it. As to defending the action, it is obvious that appearance by a defendant will not supply the place of proving a material averment. In order to recover, the plaintiff would have to make out a *prima facie* case, if there were no appearance at all. Appearing and pleading the general issue is not a confession of judgment, but puts the plaintiff on proof of his case. There was no offer to amend the declaration in this case by striking out some of the defendants, but the declaration, verdict, and judgment were against all defendants as joint owners of the ship. The plaintiff having failed to prove the joint ownership as alleged, and that being the foundation of liability as to certain of the defendants, and this being an

attachment case, the court erred in not granting a new trial for the want of evidence to uphold the joint verdict.

6. The last head-note explains itself.

Judgment reversed.

SHIPPING — PART OWNERS OF VESSELS — RIGHTS OF. — The owners of the majority interest in a vessel have the right to control her, and to direct the manner of her employment: *Gray v. Allen*, 14 Ohio, 58; 45 Am. Dec. 523. The owners of a two-thirds interest in a vessel have a right to continue her in her usual employment and are not liable to the other owners for any injury sustained by reason of such employment: *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467, and note.

SHIPPING — AUTHORITY OF PART OWNER TO BIND CO-OWNERS. — The authority of the part owner of a vessel to bind his co-owners for necessary repairs, though ordinarily implied, is not conclusively presumed and is subject to be modified or negatived by facts or circumstances to the contrary: *Eller v. Larrabee*, 45 Me. 590; 71 Am. Dec. 567, and note. An agreement with some of the owners of a vessel that freight shall be carried therein for hire, which is to be for the sole benefit of such owners, will not bind the owners who were not parties thereto for any loss of the freight shipped thereunder: *Jones v. Sims*, 9 Port. 236; 33 Am. Dec. 313.

SHIPPING — CHARTER-PARTY — CONSTRUCTION OF: See *Fish v. Sullivan*, 40 La. Ann. 193.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PEARSON *v.* ZEHR.

[138 ILLINOIS, 48.]

ANIMALS, KILLING AS DISEASED WHEN NOT DISEASED IN FACT. — In an action of trespass for breaking plaintiff's close and killing his horses and destroying his harness, a special plea by the defendants that it came to the knowledge of such of them as were the board of live-stock commissioners of the state of Illinois, that there was reasonable ground for belief that the horses of the plaintiff, kept in his close, were diseased with a dangerous, contagious, and infectious disease called "glanders," and that they, as such board, caused an examination and investigation to be made, and upon such examination and investigation found and decided three of the horses to be diseased and disordered with said disease, and one of the horses to have been exposed to infection from such disease, and the harness to be poisoned with such infection, and ordered and directed the other defendants to slaughter and kill said horses, etc., is bad on demurrer. It is the fact that domestic animals are actually stricken with contagious and infectious diseases, or have been exposed to infection therefrom, that gives to the live-stock commissioners the power to slaughter such animals, and unless such fact exists the slaughter thereof is without authority of law; and it is no justification for such slaughter that the commissioners acted in good faith, that there were reasonable grounds for the belief that some of the horses slaughtered were diseased with glanders and that others of them had been exposed to that contagion, and that they made an honest and careful investigation, to the best of their ability, and, as a result thereof, decided and determined that some of said horses were so diseased and that others of them had been so exposed.

POLICE POWER — SLAUGHTER OF HORSES SUPPOSED TO HAVE GLANDERS NOT VALID EXERCISE OF. — To permit the board of live-stock commissioners to determine, *ex parte*, that some of a man's horses have the glanders and that others have been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon the board the burden of establishing affirmatively the actual exist-

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ence of such disease and exposure, would not be a valid exercise of the police power of the state, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.

WITNESSES OTHER THAN VETERINARY SURGEONS MAY TESTIFY AS TO DISEASES OF DOMESTIC ANIMALS. — Persons other than veterinary surgeons may properly testify in respect to the appearance and symptoms of diseased horses, and give an opinion upon the question of the existence or non-existence of a particular disease or malady in such horses. Farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease, are qualified to state whether in a particular case such characteristics and symptoms do or do not exist; and after detailing facts that show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar.

EVIDENCE CONCERNING DISEASED CONDITION OF ANIMALS. — In an action against defendants for slaughtering plaintiff's horses alleged to have the glanders, it is competent for the plaintiff to show that the disease with which his horses were sick was not the glanders, and for this purpose he may introduce witnesses familiar with maladies other than glanders to which horses are subject, and show by them that the sickness from which his horses suffered was a disease of horses other than glanders. The introduction of such testimony is not a violation of the rule which excludes all evidence of purely collateral facts.

EXEMPLARY DAMAGES ALLOWED FOR RECKLESS AND OPPRESSIVE TRESPASS, WHEN. — In an action against a state board of live-stock commissioners and their servants for slaughtering plaintiff's horses as glandered, when in fact they were not, where the evidence shows that the trespass was committed in a reckless, oppressive, or wanton manner, exemplary damages may be awarded.

Palmer and Shutt, for the appellants.

W. R. Curran and B. S. Prettyman, for the appellee.

BAKER, J. The appellee, Christian Zehr, brought trespass *quare clausum fregit* against appellants for breaking and entering his close with force and arms, and killing certain of his horses and destroying certain of his harness, and he had verdict and judgment, in the circuit court of Tazewell county, for \$1,350 damages. Appellants pleaded not guilty and also special pleas, wherein they justified the acts complained of upon the ground that the horses of appellee were diseased with a certain contagious and infectious disease called "glanders," and that the harness was poisoned with the contagion of that disease; that certain of appellants were and constituted the board of live-stock commissioners

of the state of Illinois, and that others of appellants were the servants and agents of said board, and that, in pursuance of the authority conferred upon appellants by law, they entered the premises and killed the horses and destroyed the harness, doing no more harm, etc. Various replications were interposed to these special pleas, and among them replications which denied that the horses were diseased with glanders and that the harness was infected with its poison, and replications which charged an excess of force, etc., and the trial was had upon the general issue and upon the issues formed on the replications.

Complaint is made that the court sustained a demurrer to an additional plea which was filed by appellants. The substance of that plea is, that it came to the knowledge of Pearson, McChesney, and Smith, who were then the board of live-stock commissioners of the state of Illinois, that there was reasonable ground for belief that the horses of the plaintiff, kept in his close, were diseased with a dangerous, contagious, and infectious disease called "glanders," and that they, as such board of live-stock commissioners, caused an examination and investigation to be made, and upon such examination and investigation found and decided three of the horses to be diseased and disordered with said disease, and one of the horses to have been exposed to infection from such disease, and the harness to be poisoned with such infection, and ordered and directed the defendants Johnson, Williams, and Casewell to slaughter and kill said horses, etc. The duties which are to be performed by the board of live-stock commissioners, in cases where they find a dangerously contagious or infectious malady among domestic animals, are pointed out in section 2 of the act approved June 27, 1885, entitled "An act to revise the law in relation to the suppression and prevention of the spread of contagious and infectious diseases among domestic animals": Laws 1885, p. 1.

It is to be noted that the only authority given them by the statute to kill and destroy domestic animals exists in cases of contagious or infectious diseases, and is the "power to order the slaughter of diseased animals," and the power "to order the appraisement and slaughter of all such animals as have been exposed to such contagion." The statute does not afford, and does not purport to afford, immunity to the commissioners or to their agents and servants in the event they slay live-stock which has been negligently or erroneously determined

by the board to be sick with a contagious or infectious malady, or to have been exposed to such contagion. It is the fact of such disease or of exposure thereto which, under the statute, gives the power; and without the fact exists, the slaughter of the animals is not an act done under authority of law.

In the case at bar, it is no justification of that which was done that the commissioners acted in good faith; that there were reasonable grounds for the belief that some of the horses were diseased with glanders and that others of them had been exposed to that contagion, and that they made or caused to be made an honest and careful investigation and examination, to the best of their ability, and as a result thereof decided and determined that some of said horses were so diseased and that others of them had been so exposed. It is to be borne in mind that the act of 1885 makes no provision for compensation for animals killed by mistake, and which are not diseased with a contagious or infectious disease, or for paying the value of animals slaughtered upon an erroneous supposition that they had been exposed to such disease, and also makes no provision for a suit or proceeding wherein, after proper notice to the owner of domestic animals supposed to be stricken with a contagious or infectious malady, and an opportunity afforded him to be heard and to introduce his witnesses, there can be a judicial ascertainment of the fact of the existence or non-existence of such disease or of exposure thereto, and that there is no pretense here of any such ascertainment of the fact or facts. To permit the commissioners to determine, *ex parte*, that some of the horses had the glanders and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power of the state, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. In the late case of *Miller v. Horton*, 152 Mass. 540, 23 Am. St. Rep. 850, it was held by the supreme judicial court of Massachusetts that under a statute of that state providing that "in all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed, without appraisement," the order of the commissioners affords no defense to an action by the owner, for compensation, against those

who executed it, unless the animal killed is in fact infected with farcy or glanders. We think there was no error in sustaining the demurrer to the additional plea.

It is claimed that incompetent testimony was admitted in evidence over the objections of appellants. In support of their special pleas appellants produced as witnesses a number of veterinary surgeons, who testified that there is a disease among horses known as "chronic glanders," that said disease is contagious and incurable, and that they had examined the animals in question, and were of opinion that all of said animals but one had said disease of chronic glanders, and who also stated at length the characteristic symptoms of glanders.

In denial of said pleas, and for the purpose of establishing the truth of his replications thereto, appellee introduced professional and scientific testimony tending to prove the absence of the symptoms of glanders in the horses in controversy, and that said horses did not have such disease; and several witnesses of experience and observation in handling horses, and who had had knowledge, observation, and experience, more or less extensive, of and with the glanders, and who testified from their experience that the horses in question did not have the symptoms of glanders, and in their opinion did not have said disease; and also a large number of farmers and other witnesses, of many years' experience in handling and caring for horses, who had no personal knowledge of or experience with the disease called "glanders," but had extensive and frequent experience with and knowledge and observation of other diseases in horses, and who testified that they made examinations of the horses in controversy, and that they did not have the distinctive marks of glanders as detailed by the witnesses of appellants, but that they had the symptoms of another disease, and that, in their opinion and judgment, based on their experience, said horses were suffering from such other disease.

We are not prepared to hold that no one but a veterinary surgeon can properly testify in respect to the appearance and symptoms of diseased horses and give an opinion upon the question of the existence or non-existence of a particular disease or malady in such horses. It would seem that farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals and with some particular disease to which they are subject, and ample

opportunity to observe and know the characteristics and symptoms of such disease, are qualified to state whether in a particular case such characteristics and symptoms do or do not exist; and it would also seem that they, after detailing facts which show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar. It would be difficult to say that such opinion would be of no probative force whatever, and it would be for the jury to say what weight should be given it. It was entirely competent for appellee to show that the disease with which his horses were sick was not the glanders. No reason is perceived why he might not do this by introducing witnesses who were familiar with maladies other than glanders to which horses were subject, and showing by them that the sickness from which his horses suffered was a disease of horses other than glanders. The introduction of such testimony cannot be regarded as a violation of the rule which excludes all evidence of purely collateral facts. We find no material error in any of the rulings of the trial court in regard to the admission of testimony.

We have examined the instructions which were given by the court to the jury, and think that they were substantially correct. Complaint is made that some of those tendered by appellants were refused, but in our opinion several of those which were refused contained incorrect statements of the law, and the substance of the others was fully covered by instructions which were given.

It is suggested that the damages are excessive. It must be admitted that the damages assessed by the jury are some four hundred dollars more than the actual damages fairly shown by the record. But the evidence introduced by appellee tended to prove that the trespass complained of was committed in a reckless and oppressive manner. At the instance of appellants the jury was expressly instructed to assess the damages at only such sum as would compensate the plaintiff for the actual injury sustained, and no more, "unless the jury believes, from the evidence, that the defendants committed such trespass willfully or recklessly, or in wanton disregard of plaintiff's rights." It must be presumed that the jury found that the conduct of the appellants was reckless, oppressive,

or wanton. We are unable to say that such finding is so contrary to the evidence as to justify a reversal.

The judgment is affirmed.

ANIMALS—KILLING OF WHEN INFECTED WITH CONTAGIOUS DISEASE.—When necessary to secure public safety, the legislature may, under the police power vested in it, authorize the summary destruction of property: *Blair v. Forehand*, 100 Mass. 136; 1 Am. Rep. 94; 97 Am. Dec. 82, and extended note discussing the power of the legislature to authorize the summary killing of animals. While the legislature may declare horses infected with glanders nuisances, and authorize their summary killing, yet it cannot make an *ex parte* decision conclusive that a horse is diseased without giving the owner a right to be heard: *Miller v. Horton*, 152 Mass. 540; 23 Am. St. Rep. 850, and note.

UNION NATIONAL BANK OF CHICAGO v. GOETZ.

[138 ILLINOIS, 127.]

TRUST FUND CAN BE PURSUED ONLY WHILE MEANS OF IDENTIFYING IT

EXIST.—A trust fund which has been wrongfully converted into other property may, so long as its identity can be traced, be pursued and held liable in its new form to the rights of the *cestui que trust*, except as against a *bona fide* purchaser without notice; but the right to pursue it fails when the means of ascertaining its identity are lost. This is always the case when the subject-matter is turned into money, or becomes mixed and confounded in a general mass of property of the same description. Where, therefore, a merchant, by false and fraudulent representations of his financial condition, procures the loan of money to be used in his business, and invests such loan in the purchase of goods which are mixed with others so as to be incapable of identification, a court of equity will not hold the borrower to be a trustee of the lender. The relation of the parties in such a case is simply that of debtor and creditor.

BILL filed by John W. Goetz against Louis W. Reiss to settle a copartnership between them in a mercantile business in the city of Chicago, under the firm name of John W. Goetz & Co. The bill alleged the firm's insolvency, prayed the appointment of a receiver, and that all the effects of the copartnership be ordered turned over to him, to be sold by him and the debts paid under the direction of the court. The appellant, by leave of the court, subsequently became a party defendant to this bill, and filed a cross-bill alleging,—

That on the 23d of January, 1888, said Goetz & Co., for the purpose of establishing a credit with said bank, and of inducing it to loan to said firm money from time to time, as desired by them, represented and stated in writing to said bank that said firm then had, as assets, a stock of goods on hand

of the value of \$114,000, and that its liabilities were, for merchandise, not to exceed \$8,000, and for borrowed money, \$15,000; that at various times since that date the firm had made to the bank oral statements of their financial condition, all of which were to the effect that they were doing a large and profitable business and were rapidly increasing their net capital, as shown by said written statement; that the bank, relying upon said written statement and the subsequent confirmatory statements, and believing them to be true, gave to said John W. Goetz & Co. a line of credit for money loaned from time to time, from the 14th of February to the 1st of April, 1889, amounting to \$15,000; that upon the first loan there had been credited the sum of \$524.10, leaving the amount still due from said firm to said bank the sum of \$14,475.90; that the statements so made by Goetz & Co. to said bank were false and fraudulent when made, and well known by them to be false and fraudulent; that at the time of making them they did not have on hand a stock of goods of the value of \$114,000, and owed in fact for merchandise many thousands of dollars in excess of \$8,000, and many thousands of dollars for borrowed money in excess of \$15,000, and were in fact at all times insolvent; that by means of said false and fraudulent representations said bank was deceived, cheated, and defrauded, and so continued to be, and said defendants came into possession of the money so obtained by fraud, and having so obtained it, they became, and still are, trustees of the cross-complainant in respect to the same, and accountable for said moneys either in specie or whatsoever else they placed or invested it; that said trust funds were by said defendants invested and paid out from time to time, for merchandise which was by them brought into their store and there so mixed and commingled with other merchandise bought with other funds or procured by other means, that the cross-complainant is unable to identify the same, but avers that said merchandise, so purchased and paid for by said trust funds, or other merchandise bought with the proceeds thereof, to which said trust also attached, were in the store of said defendants when the same was taken possession of by the receiver, and passed into his possession, and so remained, unless disposed of by said receiver, in which case their proceeds are in his hands subject to said trust; that J. S. Huey was appointed receiver on April 10, 1889, under the original bill, and now has the custody and control of the property and

effects of said firm; that by reason of the aforesaid facts the cross-complainant is entitled in equity to pursue said trust money into the property now in the said receiver's hands, and is entitled, by reason of the confusion of goods brought about by said defendants, to a lien upon the whole stock of merchandise now in said receiver's possession for the restoration of the money out of which it has been defrauded. The cross-complainant prayed that the moneys so loaned by it and unpaid be decreed to have been obtained by the defendants by fraud, and that they be held liable as trustees of the cross-complainant in respect to the same; that such moneys be decreed to have been invested by the defendants, by successive and continuing transactions, in the merchandise now in the receiver's possession, and to have become by the act of the defendants so confused with the general bulk of such merchandise that the cross-complainant is entitled to a lien upon the whole for its reimbursement; that the receiver be directed to retain all the merchandise that came to his possession and the proceeds of any that has been sold, to abide the final decree.

The other creditors of said firm were thereupon allowed to become parties defendant to said cross-bill, and they with the receiver and Goetz filed a general demurrer to the same, which the superior court of Cook County sustained and dismissed the cross-bill. The appellate court for the first district affirmed that decree and the cross-complainant appealed.

Tenney, Hawley and Coffeen, and William E. Church, for the appellant.

Kraus, Mayer and Stein, for the appellees.

WILKIN, J. The doctrine sought to be invoked by the complainant in this cross-bill is purely and strictly an equitable doctrine, adopted by courts of chancery only in cases of necessity to prevent injustice and wrong. That the relation existing between the parties to the loans mentioned, as created by their contract, was that of debtor and creditor, must be conceded. The most that can be or is claimed by the appellant is, that on account of false representations made by the borrowers such contract was voidable, at its option, for fraud. When the fraud was discovered does not appear, and there is no pretense whatever that any attempt has been made to rescind; therefore, up to the time of filing the cross-bill, the relation of debtor and creditor existed, and if that relation can

be changed to that of trustee and *cestui que trust* it must be done by construction, under the rule that "where the acquisition of the legal estate is tainted with fraud, actual or equitable, or where the trust depends upon some equitable rule, independently of the existence of fraud," courts of chancery, in order to prevent injustice, "will raise a trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment": Hill on Trustees, 144. As before said, this is a doctrine of necessity, and it was said by Lord Nottingham in *Cook v. Fountain*, 3 Swanst. 585: "The law never implies, the court never presumes, a trust, but in case of absolute necessity."

In the effort of counsel for appellant to establish a broad equity in favor of their client on which to predicate this necessity, the rights of other creditors of Goetz & Co. are wholly ignored. In fact, it is said that the question here involved is purely one "between appellant and the parties who wrongfully obtained its money." This position is wholly untenable. The very object of this cross-bill is to obtain priority over the general creditors of the firm, both the original and cross-bills showing it to be insolvent.

In our view of the case it is unimportant to determine whether or not the fraud alleged in the cross-bill would, under other circumstances, be sufficient to authorize a court of chancery to declare the relation of trustee and *cestuis que trust* between appellant and John W. Goetz & Co., because if it be conceded that that relation should be held to exist, still the bill shows that the so-called "trust fund" has passed beyond the reach of the court in this proceeding. It will be observed that so far from attempting to identify any particular property in the hands of the receiver as having been purchased with the moneys borrowed from appellant, or the proceeds thereof, it is expressly averred that such identification is impossible, and all that is attempted by way of tracing those moneys into the assets held by the receiver is the averment that "merchandise so paid for by said trust fund, or other merchandise bought with the proceeds thereof, to which said trust also attached, were in the store of said defendants when the same was taken possession of by the receiver, and passed into his possession, and so remained unless disposed of by him, in which case the proceeds thereof are in his hands subject to said trust." The present value of the merchandise purchased

with said money, or its proceeds, is not even stated. Every allegation may be true, and still the chief value of the assets sought to be taken have resulted from other funds or credits of said Goetz & Co.

Justice Story, in his Equity Jurisprudence, speaking of the right of the owner to follow a trust fund, says: "The general proposition which is maintained, both at law and in equity, upon this subject is that if any property, in its original state and form, is covered by a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers), any more valid claim in respect to it than they had before such change. . . . It matters not in the slightest degree into what other form different from the original the change may have been made, for the product of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description": Vol. 2, sec. 1258. The same doctrine is announced and practically applied by the learned justice in *Trecothick v. Austin*, 4 Mason, 16.

This court held in *School Trustees v. Kirwin*, 25 Ill. 73, that "it is not necessary, if the trust be moneys, that the particular coin or kind of money or the individual pieces shall be identified in order to pursue it, but its identity as a fund must be preserved, so that it can be distinguished from all other money." And in that case we said: "The means of ascertaining the identity of this fund having failed by the money having been mixed and confounded in a general mass of property in the bank of the same description, the right to pursue it must also fail."

In *Thompson's Appeal*, 22 Pa. St. 16, the supreme court of Pennsylvania said: "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held in its new form, liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust* or as the product of it, equity will follow it, and the right of reclamation attaches to it until detached by the superior equity of a

bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such; but the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description. This mixture has taken place in the case under consideration. It is impossible for a chancellor to lay his hand upon a single article of property, or on a single dollar of money included in the assignment, and say that any particular thing or sum of money is either the original property of Seth Matthews' heirs or the product of it. The decree was therefore erroneous." To the same effect are *Goodell v. Buck*, 67 Me. 514; *Portland etc. Steamboat Co. v. Locke*, 73 Me. 370; *United States v. Inhabitants of Waterborough*, 2 Ware, 158; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Johnson v. Ames*, 11 Pick. 173.

Many other like cases might be cited, but enough has been shown to clearly indicate the line of decisions holding the doctrine that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee, or by those representing him, and that this court is fully committed to that rule. When it is said that the matters decided in *King v. Hamilton*, 16 Ill. 190, *Clapp v. Emery*, 98 Ill. 523, or *First National Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, recognize, much less hold, a different doctrine, the scope of these cases is clearly misconceived. They in no way conflict with *School Trustees v. Kirwin*, 25 Ill. 73.

Comment upon the authorities cited by counsel for appellant said to hold a different rule is unnecessary. Many of them are reviewed by Seymour, J., in *Philadelphia National Bank v. Dowd*, 38 Fed. Rep. 172, and shown to be reconcilable with the rule above announced, which he applies to the facts of that case, and holds to be the one supported by the great weight of authority in this country. It is clear, however, that none of the authorities relied upon, under the most liberal interpretation, can be construed as authority for sustaining this cross-bill, thereby giving appellant a prior lien upon the general assets held by the receiver. The principle upon which a trust fund is pursued and its proceeds held subject to the trust is, that the trustee has wrongfully, and contrary to the intention of the owner, converted it, and where there is a commingling of funds or property, that has been done without the

consent of the *cestui que trust*. If, as contended here, appellant has a right to a lien upon the whole assets held by the receiver, it must be because Goetz & Co. wrongfully put its money into some of those assets, and wrongfully commingled them with others into a general mass, on the principle that a court of equity will not allow the right of the *cestui que trust* to be defeated by the wrongful, unauthorized act of the trustee. But the cross-bill does not attempt to show such wrongful conversion or commingling. The fair inference from its allegations is, that the money was borrowed with the express understanding that it was to be used by the borrowers just as it was used, in the general business of the firm. The allegations of fraud go only to the manner of obtaining the money, — might be given the effect to create the relation of trustee and *cestui que trust*, — but these allegations in no sense charge a misappropriation or wrongful confusion of the trust fund.

We are clearly of the opinion that there is no principle of equity upon which this cross-bill can be maintained, and the judgment of the appellate court will be affirmed.

Judgment affirmed.

RIGHT TO PURSUE AND RECOVER TRUST FUNDS. — No right is more fully recognized, both at law and in equity, than the right of a *cestui que trust* to pursue and recover trust funds wrongfully diverted, provided their identity has not been lost, and they have not passed into the hands of a *bona fide* purchaser for a valuable consideration without notice. Whenever property in its original state and form has once been impressed with the character of a trust, no subsequent change of such state and form can divest it of its trust character, so long as it is capable of clear identification; and the beneficiary of the trust may pursue and reclaim it in whatever form he may find it, unless it has passed into the possession of a *bona fide* purchaser without notice: 2 Story's Eq. Jur., sec. 1258; 2 Pomeroy's Eq. Jur., sec. 1048; Flint on Trusts and Trustees, sec. 317; Tiffany and Bullard on the Law of Trusts and Trustees, 33; 2 Lewin on Trusts, 892; 2 Perry on Trusts, secs. 835, 836; *Knatchbull v. Hallett*, L. R., 13 Ch. Div. 696; *Pennell v. Duffell*, 4 De Gex, M. & G. 372; *Taylor v. Plumer*, 3 Maule & S. 562; *Oliver v. Platt*, 3 How. 333; *Cook v. Tullis*, 18 Wall. 332; *Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co.*, 104 U. S. 54; *Trecothick v. Austin*, 4 Mason, 16; *Parker v. Jones*, 67 Ala. 234; *Wells v. Robinson*, 13 Cal. 134; *George v. Ransom*, 14 Cal. 658; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257; *Kirby v. Wilson*, 98 Ill. 240; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Johnson v. Ames*, 11 Pick. 173; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn. 75; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Isom v. First Nat. Bank*, 52 Miss. 902; *Barr v. Cabbage*, 52 Mo. 404; *Phillips v. Overfield*, 100 Mo. 466; *Smith v. Combs*, 49 N. J. Eq. 420; *Van Alen v. American Nat. Bank*, 59 N. Y. 1; *Newton v. Porter*, 69 N. Y. 133; 25 Am. Rep. 152; *Ferris v. Van Vechten*, 73 N. Y. 113; *People v. City Bank of Rochester*, 96 N. Y. 32; *Thomz*

son's Appeal, 22 Pa. St. 16; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Treadwell v. McKeon*, 7 Baxt. 201; *Overseers of the Poor v. Bank of Virginia*, 2 Gratt. 544; 44 Am. Dec. 399.

In the case of *Pennell v. Deffell*, 4 De Gex, M. & G. 388, Turner, L. J., said: "As between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust"; and Mr. Justice Field, in delivering the opinion of the court in *Cook v. Tullis*, 18 Wall. 332, said:—

"It is a rule of equity jurisprudence, perfectly well settled and of universal application, that where property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*."

In the case of *Kirby v. Wilson*, 98 Ill. 240, it was decided that where a person sells cattle belonging to another, under a contract, and receives and retains the purchase-money until his death, it becomes the money of the owner of the cattle, as the substitute or representative of the cattle; and the fact that the widow of the person so selling during his sickness or after his death takes such money and deposits it in bank in her own name, and afterward gives her check for the same to her husband's executor, will not destroy the identity of the fund and make it subject to the general creditors of the testator, but the owner of the cattle so sold will have a preference over the general creditors of the estate.

TRUST FUND MAY BE FOLLOWED INTO HANDS OF STRANGER. — If a trustee commits a breach of his trust, or is guilty of an illegal conversion of the trust property, the *cestui que trust* may follow the property into the hands of a stranger to whom he has conveyed it. In such a case, the equitable right of the *cestui que trust* may be successfully asserted against any person whatsoever, who is either a volunteer with or without notice or a purchaser for a valuable consideration with notice: *Oliver v. Piatt*, 3 How. 333; *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183; *Parker v. Jones*, 67 Ala. 234; *School Trustees v. Kirwin*, 25 Ill. 73; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Isom v. First Nat. Bank*, 52 Miss. 902. As was said by Lord Ellenborough, in *Taylor v. Plumer*, 3 Maule & S. 574: "An abuse of trust can confer no rights on the party abusing it nor on those who claim in privity with him." So long as trust funds which the trustee has misapplied or converted into other property or mixed with his own funds can be traced and identified, the court will always attribute the ownership to the *cestui que trust*, and will not allow his right to be defeated by the wrongful act of the trustee in mixing or confusing the trust funds with his own or with those of a third party: *Taylor v. Plumer*, 3 M. & S. 562; *Frith v. Carthland*, 2 Hem. & M. 417; *Cook v. Tullis*, 18 Wall. 332; *Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co.*, 104 U. S. 54; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571; and the *cestui que trust* may elect either to hold the substituted property liable to the original trust or to hold the trustee personally liable for the breach of the trust: *Oliver v. Piatt*, 3 How. 333; *McLeod v. First Nat. Bank*, 42

Miss. 99; *Isom v. First Nat. Bank*, 52 Miss. 902; *Barr v. Cabbage*, 52 Mo. 404; *Ferris v. Van Vechten*, 73 N. Y. 113; *Treadwell v. McKeon*, 7 Baxt. 201. The rules as to following trust funds into the hands of a defaulting trustee apply against the assignees of a defaulting trustee as fully as against the trustee himself: *Frith v. Cartland*, 2 Hem. & M. 417; *Taylor v. Plumer*, 3 Maule & S. 562.

The true owner of a trust fund traced to the possession of another has the right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him; and it makes no difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened: *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332.

TRUST FUND INVESTED IN LANDS MAY BE FOLLOWED. — If a trustee invests trust funds in lands, taking the title thereto in his own name, the *cestui que trust* may at his election either claim the lands or fasten a charge upon them for the reimbursement of the funds so invested, and this equity follows the lands until they pass into the hands of a *bona fide* purchaser for a valuable consideration without notice: *Smith v. Perry*, 56 Ala. 266; *Ferris v. Van Vechten*, 73 N. Y. 113. Where, however, it is sought to follow money into land and to impress the latter with a trust, the money must be distinctly traced and clearly proved to have been invested in the land. It is not sufficient to show the possession of money of the trust by the trustee and the purchase of land by him. No presumption arises from the payment alone that it was made with the trust funds: *Phillips v. Overfield*, 100 Mo. 466; *Ferris v. Van Vechten*, 73 N. Y. 113. But in *National Mahanice Bank v. Barry*, 125 Mass. 20, it was decided that equity will charge land paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank; and on a bill to charge land alleged to have been paid for in part by money known to have been stolen from the bank with a trust in its favor to the extent of the partial payment, evidence that a short time before the purchase a son of the purchaser received from the thief, knowing it to have been stolen, about the amount of the partial payment; that the son was a minor living with his parents, and that neither the purchaser nor her husband had sufficient means to make such payment, will warrant a decree in favor of the complainant; and in *Ferris v. Van Vechten*, 73 N. Y. 120, Allen, J., delivering the opinion of the court, said: "When the purchase-money paid by a trustee for lands purchased corresponds very nearly with that of the trust fund to be invested, that, with other circumstances, as the coincidence of the time of the receipt and disbursement, may suffice to show that the property was actually purchased with trust funds."

RIGHT TO PURSUE TRUST FUND CEASES WHEN MEANS OF ASCERTAINMENT FAIL. — While the *cestui que trust* may follow a trust fund through any number of transmutations and into the hands of any person except a *bona fide* purchaser for a valuable consideration without notice, so long as he can clearly identify it, it is well settled that his right to so pursue it fails when the means of ascertaining its identity fail: *Tiffany and Bullard on the Law of Trusts and Trustees*, 33; *Taylor v. Plumer*, 3 Maule & S. 562; *Knatchbull v. Hallett*, L. R., 13 Ch. Div. 696; *Illinois Trust and Savings Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *School Trustees v. Kirwin*, 25 Ill. 73; *Gondell v. Buck*, 67 Me. 514; *Portland & H. S. Co. v. Locke*, 73 Me. 370; *Johnson v. Ames*, 11 Pick. 173; *Neely v. Rood*, 5 Mich. 134; 52 Am. Rep. 802; *Phillips*

v. *Overfield*, 100 Mo. 466; *Ferris v. Van Vechten*, 73 N. Y. 113; *United States v. Inhabitants of Waterborough*, 2 Ware, 158; and most of the cases last cited hold that where the trust property, especially when it has been turned into money, has been mixed and confounded in a general mass of property of the same description, its identity is lost. In that case, the *cestui que trust* stands on no better footing than other creditors of the trustee. In *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141, it was held that the identity of a trust fund in the hands of a testator is entirely lost where the executor has possession of his testator's estate, and it cannot be shown that such trust property is in the executor's hands in its primary condition, or that it was converted by the testator into the property, or any part of it, which subsequently came into the executor's possession. See also *Phillips v. Overfield*, 100 Mo. 466.

SUBSTANTIAL IDENTITY OF TRUST FUNDS SUFFICIENT.—In following a trust fund, it is not necessary to trace the identical coins or bills of which it is composed. Substantial identity is all that need be proved, and substantial identity is not oneness of pieces of coin or of bank bills. The *cestui que trust* may pursue and recover a trust fund, although he is unable to trace the identical coins or bills, so long as its identity as a fund is capable of ascertainment: *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *School Trustees v. Kirwin*, 25 Ill. 73; *Kirby v. Wilson*, 98 Ill. 240; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; 20 Am. St. Rep. 442; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *United States v. Inhabitants of Waterborough*, 2 Ware, 158.

EAR-MARK NOT NOW INDISPENSABLE TO IDENTIFICATION OF TRUST FUND. It was at one time a doctrine of the English law, recognized also by some of the early authorities in this country, that property having no ear-mark to distinguish it from other property of the same kind could not be pursued by the true owner thereof after it had been mingled in one mass. The later English cases, however, repudiate this doctrine, and it is now held there that the proposition that you cannot follow money in equity because it has no ear-mark is not now law: *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Frith v. Cartland*, 2 Hem. & M. 420; *Knatchbull v. Hallett*, L. R., 13 Ch. Div. 696; and the doctrine of these cases has been approved and followed in the recent decisions in this country: *Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co.*, 104 U. S. 54; *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571; *Ferris v. Van Vechten*, 73 N. Y. 113; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215. In the case of *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, Norton, J., delivering the opinion of the court, said: "We have been cited by counsel for appellant to a number of authorities maintaining the doctrine that trust money intermingled with other money cannot be followed by the *cestui que trust*, because money has no ear-mark, and among others is the case of *Mills v. Post*, 76 Mo. 426, to which we are unwilling further to adhere, in so far as it recognizes the principle that trust money mixed with other money cannot be followed because it cannot be distinguished by reason of its having no ear-mark, believing the rule announced in the cases above cited by us to be more in consonance with sound reason and more productive of just results." In the case of *First Nat. Bank v. Hummel*, 14 Col. 259, 20 Am. St. Rep. 257, will be

found a review of the principal cases establishing the modern doctrine on the subject under consideration.

TRUST MONEY MINGLED WITH TRUSTEE'S MONEY IN HIS BANK ACCOUNT FOLLOWED. — The later cases, both in England and in this country, hold that, where a trustee mixes trust money in the same heap or mass with his own, or deposits it in a bank to the account of himself, placing his own money in the same account, even though the identical pieces of coin cannot be ascertained, yet, as there is so much trust money in the general heap or account, the *cestui que trust* is entitled to take so much out. In such case, the court will separate and disentangle the trust money from the private money of the trustee, and will award the former specifically to the *cestui que trust*: 2 Lewin on Trusts, 894; 2 Perry on Trusts, secs. 837, 838; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Ex parte Dale & Co.*, L. R., 11 Ch. Div. 772; *Knatchbull v. Hallett*, L. R., 13 Ch. Div. 696; *Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co.*, 104 U. S. 54; *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257; *Independent District of Boyer v. King*, 80 Iowa, 497; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; *Curley v. Graves*, 85 Mich. 483; 24 Am. St. Rep. 99; *Stoller v. Coates*, 88 Mo. 514; *Smith v. Combs*, 49 N. J. Eq. 420; *Van Alen v. American Nat. Bank*, 52 N. Y. 1. In the case of *Pennell v. Deffell*, 4 De Gex, M. & G. 383, Knight Bruce, L. J., said: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trust*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death, on one hand, and the trust on the other. This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee or owing also to him, money in every sense his own"; and in *Frith v. Cartland*, 2 Hem. & M. 420, Sir W. Page Wood, V. C., said: "If a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own"; and the rule which was laid down in *Clayton's Case*, 1 Mer. 572, that the sums drawn out of the bank must be attributed to the earliest deposits according to the order in which they are paid in, has been changed by the later authorities. The trustee will be presumed to have drawn out his own funds, and to have left the moneys held in trust. In discussing this subject in *Pennell v. Deffell*, 4 De Gex, M. & G. 382, Knight Bruce, L. J., said: "He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right, and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible." This doctrine seems to be now firmly established: *Knatchbull v. Hallett*, L. R., 13 Ch. Div. 696; *Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co.*, 104 U. S. 54; *Smith v. Combs*, 49 N. J. Eq. 420; *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85; 2 Lewin on Trusts, 894.

TRUST FUNDS FOLLOWED INTO PARTNERSHIP. — A *cestui que trust* may follow his own money into the hands of a firm of which a defaulting trustee is a member, and demand it back, if he can show that the firm still has it, and that the firm did not come by it by purchase for value without notice:

1 Lindley on Partnership, 162; but to make a partnership, one member of which has used trust funds in the partnership business, or in payment of its debts, liable to the *cestui que trust*, it must be shown that the rest of the partners knew whence the money came, or knew that it did not belong to the partner who used it: *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332.

SNYDER v. PARTRIDGE.

[138 ILLINOIS, 173.]

MISTAKE IN WRITTEN INSTRUMENT — RELIEF AGAINST, WHEN MAY BE GRANTED. — In cases of mistake in written instruments, courts of equity interfere not only as between the original parties, but also as against voluntary grantees and purchasers with notice of the facts. When, therefore, a mortgage is by mistake given on the north half of a quarter section of land instead of on the south half of such quarter-section, and a party, having notice of the mistake, buys such south half, advancing as consideration therefor about one fourth of the value thereof, and takes a deed in the name of another person who has notice of the facts, and then makes a sale to an innocent purchaser, who receives a deed, a court of equity will require the party who procures the deed from the mortgagor to account to the mortgagee for the profits made on his purchase over and above what he has paid for the land, and will apply that sum to the payment of the mortgage.

PRINCIPAL AND AGENT — AGENT'S KNOWLEDGE. — The rule that the knowledge of an agent, in order to affect his principal with notice, must be acquired by him during his agency and in the course of the same transaction from which the principal's rights and liabilities arise, has no application to a case where it is clear that the information obtained by the agent in a former transaction was so precise and definite that it must have been present to his mind while engaged in the second transaction, and the agent was at liberty to communicate such information to his principal.

CONVEYANCE CONSIDERED VOLUNTARY TO EXTENT OF DIFFERENCE BETWEEN ACTUAL CONSIDERATION AND REAL VALUE WHEN. — Where the consideration paid is small in comparison with the real value of the property, and when the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one to the extent of the difference between the actual consideration and the real value of the property, and to that extent will be treated as fraudulent and void as to existing creditors.

MORTGAGE LIEN ON SURPLUS FROM SALE UNDER PRIOR ENCUMBRANCE. — A mortgage lien will attach to the surplus arising from the sale of the premises under a prior encumbrance.

MORTGAGE — DESCRIPTION IN, CORRECTION OF. — A mortgagee who takes a mortgage intended to be upon the south half of a quarter-section of land owned by the debtor, but which is by mistake described as the north half of such quarter-section, is entitled, as against the mortgagor, to have the mortgage reformed and foreclosed against the land intended to be described, but not as against a subsequent *bona fide* purchaser without notice of the mistake.

Hopkins and Hammond, for the appellant.

William Don Maus, for the appellees.

MAGRUDER, C. J. This is a bill filed in the circuit court of Tazewell county on August 21, 1885, by Isaac Snyder, the appellant, against John A. Harris, and his wife Elizabeth Harris, and Alexander Partridge, William C. H. Barton, and August Seibold. The bill, as originally filed and as subsequently amended, seeks to reform a mortgage, or trust deed, by correcting a mistake in the description of the land, and to foreclose the same, and, in case the land intended to be mortgaged has been conveyed to the defendant Seibold without notice on his part of complainant's rights, to require the other defendants to pay the mortgage debt. The bill also prays for other and further relief. Default was entered against Harris and his wife, and the other defendants answered the bill. The court below, after a hearing of the cause at the November term, 1889, upon pleadings and proofs, dismissed the bill for want of equity. This decree of dismissal has been affirmed by the appellate court, and the judgment of the latter court is brought before us for review by appeal.

On June 18, 1873, John A. Harris borrowed one thousand dollars of the complainant, Isaac Snyder, giving his note payable five years after date, with interest at ten per cent per annum. At that time Harris owned eighty acres of land, being the south half of the northwest quarter of section 11, township 26 north, range 4 west, in Tazewell County, and, to secure the note, he and his wife on the same day executed a trust deed to John Snyder, as trustee, intending thereby to convey the south half of said quarter-section. This trust deed was recorded on June 20, 1873, but, by mutual mistake of both parties, the land mentioned in the trust deed was described as the north half of the northwest quarter of section 11 instead of the south half thereof. Harris had no interest whatever in the north half of the quarter-section, which was owned and occupied by other parties. Complainant was not able to read or write, and the attorney upon whom he relied to draw the trust deed wrote "north" when he should have written "south." The mistake was not discovered by the complainant until a few weeks before the present bill was filed.

It is not disputed that the mistake in question was made and that it was mutual, and that it remained unknown to any of the parties interested for many years, and that the in-

tention was to mortgage the south half of the quarter-section, which was the land on which Harris lived, and the only land which he owned. Harris has never paid more than about fifty dollars upon the indebtedness, and at the time of filing the bill was insolvent, and for a long time prior thereto had owned no other property except such interest as he had in this land.

Under these circumstances there can be no doubt that the complainant, as between himself and Harris, would be entitled to have the trust deed reformed and foreclosed against the land intended to be described.

But, by quitclaim deed dated July 1, 1885, acknowledged July 3, 1885, and recorded July 8, 1885, Harris alone, his wife not joining with him, conveyed the north seventy-eight acres of said south half to the defendant Barton. By quitclaim deed, dated August 14, 1885, acknowledged August 15, 1885, and recorded August 17, 1885, Barton and wife conveyed the said north seventy-eight acres of said south half to the defendant, Seibold. Also, for the purpose of conveying the dower of Mrs. Harris, a quitclaim deed conveying said seventy-eight acres to Seibold, bearing date August 14, 1885, and signed by Harris and his wife, was by them acknowledged on August 15, 1885, and recorded August 17, 1885.

It will be noted that the deeds to Seibold were recorded four days before the present bill was filed. Neither the deed from Harris to Barton, nor the deeds from Barton and wife and from Harris and wife to Seibold, make any reference to the Snyder mortgage. At the respective dates of the execution of those deeds the record showed no mortgage upon the south half of the quarter-section, and it is claimed on behalf of the appellees that Barton and Seibold were *bona fide* purchasers without notice of Snyder's mortgage, or of the mistake in the description therein. The proof shows that Harris received one thousand dollars for his conveyance to Barton, and that Seibold paid for the deeds to him \$1,550 in cash, and executed to Barton a mortgage, dated August 15, 1885, and recorded August 22, 1885, to secure three notes, two for five hundred dollars each, due in one and two years, and one for eight hundred dollars, due in three years, all drawing interest at six per cent per annum.

The original bill charges that Barton and Seibold had notice, before the execution of the deeds to them, of the existence of complainant's mortgage upon the north half of the

quarter-section, and of the error in the description, and of the intention of both Harris and Snyder to mortgage the south half, and that the deeds to Barton and Seibold were made for the purpose of cheating and defrauding the complainant out of his security, and to place the title beyond his reach.

The bill as amended makes Alexander Partridge a defendant, and in addition to the charges in the original bill makes the further charge that Partridge knew all about the trust deed from Harris to Snyder and the mistake in the description and that Partridge paid Harris the thousand dollars himself and conspired with Barton to act as an innocent purchaser, and procured the deed to be executed to Barton instead of himself, and that Barton assisted in the fraud and conveyed the land to Seibold to abet and protect Partridge in the fraud, and that if the land cannot be reached by bringing home knowledge to Seibold, Barton and Partridge are equitably liable for the amount due upon complainant's note and mortgage, and that Harris is wholly irresponsible, etc.

It is a well-settled doctrine that in cases of mistake in written instruments courts of equity will not only interfere as between the original parties, but also as against voluntary grantees, and purchasers with notice of the facts: 1 Story's Eq. Jur., sec. 165, and cases cited in the notes; *Wyche v. Greene*, 11 Ga. 173; *Sickmon v. Wood*, 69 Ill. 329; *Russell v. Ranson*, 76 Ill. 167; *Erickson v. Rafferty*, 79 Ill. 209; *Bent v. Coleman*, 89 Ill. 364.

We do not think that the evidence establishes notice to Seibold of complainant's equities. There are many circumstances which lead to the suspicion that he may have known of complainant's mortgage and of the mistake therein; but the proof is not clear that Seibold had actual notice, or notice of such circumstances as were sufficient to put him upon inquiry.

The case is, however, very different with Barton. The proof in regard to him gives rise to more than mere suspicion; it tends very strongly to show either that Partridge was the real purchaser, and had placed the title in Barton for purposes of concealment, or that Barton had notice of complainant's equities, or of such circumstances as were calculated to put him upon inquiry. Partridge was connected with this whole transaction from beginning to end. He had at one time been in business in the matter of running a ferry with Snyder. He induced Snyder to lend the thousand dollars to Harris in June,

1873; \$429.50 borrowed by Harris of Snyder in 1879 was used in part to pay a judgment rendered against Harris and Partridge. Partridge was exceedingly intimate with Barton, and worked for him "quite a while running a mill," and did "sawing" for Barton at his own mill, and bought a mill of Barton, and had many dealings with him, and at one time borrowed five thousand dollars of Barton to use in his bridge business. He was also very intimate with Harris. He supposed for years that the Snyder trust deed rested upon the south half of the quarter-section, but he discovered that the trust deed had been placed by mistake upon the north half long before the conveyance of Harris to Barton. Some of the witnesses testify that Partridge knew of this mistake a number of years before Harris made the deed to Barton. Partridge himself admits that he knew of it in the winter before July, 1885. He tried for a long time to sell the land for Harris so as to pay off the Snyder mortgage, but says that he took no steps to sell it for Harris after he found that the trust deed was on the wrong land. A number of witnesses testify that Partridge had spoken to them of some business difficulty he had had with Snyder, and that they had heard him threaten to prevent Snyder from making anything out of his trust deed. The records show that in 1874 Harris deeded to Partridge and Snyder a strip of land two rods wide "off of the full length of the south side of" said northwest quarter "for the purpose of a public road, should one be established to a ferry or a bridge across the Illinois river," etc. Hence, the deed to Barton only conveyed seventy-eight acres.

Harris swears that he sold the land to Partridge; that all he received was one thousand dollars; that Partridge paid him the money, and that he knew it was Partridge's money; that he had no negotiations or conversation with Barton until his trade with Partridge was closed; that Partridge requested him to make the conveyance to Barton, giving as a reason that Snyder was aware of his (Partridge's) knowledge of the mortgage, "but that the land could be sold to a third party, who would appear as an innocent purchaser"; that, by previous arrangement, Barton was to go the next day to the office of an attorney named Cameron, and receive the deed; that on the next day the deed was delivered to Barton in Cameron's office. Harris says: "For several years before this sale I had requested Partridge to try and find me a pur-

chaser for the land. He did not do so, but bought it himself."

Mr. Cameron, the attorney, confirms the testimony of Harris upon this point. He says: "He (Harris) told me that he had an offer from Alexander Partridge of one thousand dollars and afterward he told me that the deed was to be made to W. C. H. Barton. . . . I told him it made no difference whom he deeded it to, if Partridge directed it. . . . Think I was present when the deed from Harris to Barton was made." Cameron also swears that the first time Partridge came to see him about it, Partridge told him that he had offered one thousand dollars to Harris, and had been instructed by Harris to come and see him (Cameron) about it, and that he, Cameron, tried to induce Partridge to raise his offer, but he refused to do so, and said: "I have offered that, and will give nothing more, and you had better advise Harris to take it."

Partridge and Barton contradict Harris and Cameron upon this subject. Partridge is contradicted in material matters by so many witnesses, and his evidence is so full of manifest misstatements, that we give little credit to it. Barton's evidence shows that he knows very little about the transaction. He admits that he had a stroke of apoplexy, and had been in poor health for four or five years before testifying. He does not even know whether he is a party to the present suit or not. He cannot tell how he became informed that Harris would sell the land. He speaks of giving up some notes to Harris when the one thousand dollars was paid, but cannot state the exact amount of them; and neither Harris nor Cameron, both of whom were present, speak of seeing the notes. He says that his memory is poor. He cannot tell where he got the money which he claims to have paid to Harris. He cannot tell how much money Seibold paid him in cash when the latter bought the land. He could not swear that Seibold paid him more than five hundred dollars, and thinks that the amount was seven hundred dollars, whereas Seibold swears, and other proof shows, and it is not denied, that Seibold paid him fifteen hundred dollars in cash. On his cross-examination he denies what he said on his direct examination as to Seibold's statements to him.

If Barton bought the land himself, then there are many circumstances which tend to show, either that he had notice, or was put upon inquiry. The consideration expressed in the quitclaim deed made to him by Harris was three thousand

five hundred dollars, when, as matter of fact, he only paid one thousand dollars. The uncontradicted testimony shows that the land which he was getting for one thousand dollars was worth four thousand dollars. Either before or immediately after he received his deed from Harris, Partridge began to negotiate a transfer to Seibold. Barton says he was furnished with an abstract and had it examined. The taxes of 1884 were a lien on the land on May 1, 1885, and it was the duty of Harris to pay them. Inquiry would have shown that on May 26, 1885, the taxes of 1884 were paid not by Harris, but by Snyder, at the county collector's office. The records showed that the whole south half of the quarter-section, including said seventy-eight acres and the two acres transferred to Partridge and Snyder, was sold for the taxes of 1883 on June 20, 1884. Inquiry of Snyder as to the non-payment of his proportion of the taxes on the whole eighty acres may have led to the discovery of Snyder's mortgage. Barton admits that before he delivered to Seibold the deeds executed by himself and wife and Harris and wife, and before he had received any purchase money from Seibold, he was told by one Hoshor that Snyder claimed to have a mortgage on the land. Hoshor's testimony is to the effect that Barton merely asserted that the abstract of the record did not show any mortgage in favor of Snyder, without denying that he had knowledge of it. Barton knew that Harris had had difficulty with his family, and had separated from his wife, and was anxious to get his thousand dollars and leave the state. The evidence is also clear that Barton had known the land ever since boyhood and was acquainted with its value. If he bought the land himself, Partridge was his agent in the matter. The negotiations with Harris and with Cameron were carried on by Partridge, as has already been shown. Partridge obtained the deed from Mrs. Harris and her husband, in order to release the dower claim, as late as August 15, 1885, and paid Mrs. Harris fifty dollars for signing the deed. He conducted all the negotiations in relation to the transfer of the property to Seibold. If he was acting, not for himself, but as agent for Barton, then his notice of Snyder's mortgage will be regarded as notice to Barton. It is a general rule that, where an agent has acquired information before the commencement of his agency, the principal will not be charged with constructive notice thereof. One reason of the rule is, that no man can be supposed always to carry in his mind the recollection of former occurrences:

Hood v. Fahnestock, 8 Watts, 489; 34 Am. Dec. 489. Another reason is, that where the agent is an attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client: *Hood v. Fahnestock*, 8 Watts, 489; 34 Am. Dec. 489; *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388.

But the rule that the knowledge of the agent must be acquired during his agency and in the course of the same transaction from which the principal's rights and liabilities arise in order to affect the principal with notice, has no application where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction (2 Pomeroy's Eq. Jur., sec. 672, and cases cited in note), and where the agent is at liberty to communicate his information to the principal: *Williams v. Tatnall*, 29 Ill. 553; *Dunlap v. Wilson*, 32 Ill. 517; *The Distilled Spirits*, 11 Wall. 356. The English rule is, that if the agent at the time of the purchase has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. The supreme court of the United States has approved of the English rule subject to the qualifications that the knowledge of the agent is present to his mind at the time of effecting the purchase for his principal and that the agent is at liberty to communicate his knowledge to his principal, and that it is his duty to do so: *The Distilled Spirits*, 11 Wall. 356.

In the case at bar, Partridge was not an attorney, and did not acquire his information while sustaining a confidential relation to anybody. He acquired it from outside parties, and by employing an attorney to examine the records for him. The testimony of Harris, of Cameron, of other witnesses, and his own evidence, show clearly that the knowledge of the Snyder mortgage was present to the mind of Partridge during all the negotiations.

It follows that if Partridge bought this property for himself in Barton's name, the purchaser had notice of Snyder's equities. If Barton bought it, he either had constructive notice of Snyder's rights through the knowledge of his agent, or actual knowledge, or knowledge of circumstances sufficient to put him upon inquiry. Under these circumstances, we think that Barton and Partridge are bound to account to Snyder for

all the purchase-money received from Seibold, and interest thereon, except the \$1,000 or \$1,050 paid by them, or one of them, to Harris, with lawful interest from time of payment; and Seibold is liable with them for such portion of the purchase-money as he has paid to either of them since he was served with process in this suit. This holding is based upon the principles of law hereinafter announced. Where the consideration paid is small in comparison with the real value of the property, and where the circumstances of the case are extremely unfavorable to the fairness of the transaction though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one to the extent of the difference between the actual consideration and the real value of the property, and to that extent will be treated as fraudulent and void as to existing creditors: *Boyd v. Dunlap*, 1 Johns. Ch. 479; *Keeder v. Murphy*, 43 Iowa, 413; *Worthington v. Bullitt*, 6 Md. 172; *Strong v. Lawrence*, 58 Iowa, 55; *Norton v. Norton*, 5 Cush. 524; *Church v. Chapin*, 35 Vt. 223; *Robinson v. Stuart*, 10 N. Y. 189.

In the case at bar the proof shows that the property was worth \$4,000, while Barton and Partridge, either one or both of them, only paid for it \$1,000 or \$1,050. As, however, the sum of \$4,000 is the value as fixed by the opinions of witnesses, we accept \$3,350, the amount of the sale to Seibold, as the value upon the basis of which the defendants should account. Snyder is entitled to have two thousand three hundred dollars of this sum applied to the payment of his debt.

We are aware that the doctrine which holds a conveyance for less than the real value to be voluntary so far as the value exceeds the consideration paid has been ordinarily applied where the creditor seeking to reach the property has obtained a judgment and filed a creditor's bill; but in the present case the court had jurisdiction to correct the trust deed, and enforce it as thus corrected against the south half of the quarter-section. Inasmuch, however, as the land cannot be reached, the court will seize hold of the money which the sale of the land has realized. The fund stands in the place of the land, and the lien, which would have attached to the land but for its transfer, will be permitted to attach to the fund produced by the transfer.

It is a well-settled principle of law that a mortgage lien will attach to the surplus arising from the sale of the prem-

ises under a prior encumbrance: 1 Jones on Mortgages, 4th ed., sec. 708; *Bartlett v. Gale*, 4 Paige Ch. 503. Here the *bona fide* purchaser, Seibold, has a right to hold the land. His equity is equal with that of Snyder: 1 Story's Eq. Jur., sec. 165. It may be said, also, that Barton or Partridge may be regarded as having a prior right to hold the sum of \$1,000 or \$1,050 out of the proceeds of sale, to reimburse themselves for what they advanced to Harris. To the extent of the \$1,000 or \$1,050 they are prior lienors or encumbrancers; but as to the surplus of \$2,300, we see no reason why the equitable rights of the appellant cannot attach to it, the same as if he was a subsequent encumbrancer entitled to the surplus arising from a sale under a prior encumbrance.

As to the mortgage for \$429.50, held by Snyder against Harris, and which was never recorded, we find no evidence of notice that is sufficient to bind any of the parties.

The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

Judgment reversed.

MISTAKE IN WRITTEN INSTRUMENTS — RELIEF IN EQUITY. — Equity relieves against mistakes and accidents, not only as against the original parties, but also those claiming under them with notice of the facts: *Simpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228, and note. But a deed that is purely voluntary cannot be reformed for a mistake at the suit of the grantee named therein: *Guyer v. Spaulding*, 33 Neb. 573.

AGENCY — KNOWLEDGE OF AGENT WHEN NOTICE TO PRINCIPAL. — Knowledge of a fact acquired by an agent at a time when he is not acting as such, if actually in his mind when afterward acting for his principal will, as respects that transaction, be imputed to the principal: *Wilson v. Minnesota etc. Ins. Co.*, 36 Minn. 112; 1 Am. St. Rep. 659; and the same rule holds as to knowledge acquired in a former transaction by an agent for his principal: *Constant v. University of Rochester*, 111 N. Y. 604; 7 Am. St. Rep. 769, and note; *Ruyburn v. Davison*, 22 Or. 242; see also extended notes to *Trentor v. Pothan*, 24 Am. St. Rep. 228, and *Fairfield Savings Bank v. Chase*, 39 Am. Rep. 323.

VOLUNTARY CONVEYANCES — TO WHAT EXTENT UPHELD. — Where an assignment of property is set aside on the sole ground that it is constructively fraudulent as to creditors, it will be upheld to the extent of the actual consideration: *Beidler v. Crane*, 135 Ill. 93; 25 Am. St. Rep. 349; note to *Jenkins v. Clement*, 14 Am. Dec. 705. See also extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739.

MORTGAGES — SURPLUS PROCEEDS OF SALE — RIGHTS OF JUNIOR MORTGAGES. — The surplus proceeds of a sale to satisfy a mortgage belong to subsequent mortgagees and may be recovered by them: *Webster v. Singley*, 53 Ala. 208; 25 Am. Rep. 609; *Burchell v. Osborne*, 119 N. Y. 486; *Polk*

County v. Sypher, 17 Iowa, 358; 85 Am. Dec. 568, and note; *White v. Dougherty*, 1 Mart. & Y. 309; 17 Am. Dec. 803.

MISTAKE AS TO LAND CONVEYED — CORRECTION OF. — Mistakes of parties in conveyances of land as to its location and description may be corrected on sufficient proof: *Stille v. McDowell*, 2 Kan. 374; 85 Am. Dec. 590, and note; *Goff v. Jones*, 70 Tex. 573; 8 Am. St. Rep. 619.

LITTLE v. DYER.

[138 ILLINOIS, 272.]

JUDGMENT BY CONFESSION, DEBTS UPON WHICH MAY BE FOUNDED. — The word "debt" in section 66 of the Illinois practice act, which provides that any person, for a debt *bona fide* due, may confess judgment by himself or attorney, duly authorized, either in term time or vacation, without process, is used as indicative of a sum certain that is owing from one person to another.

JUDGMENT BY CONFESSION, WHAT IS. — The confession of judgment contemplated by section 66 of the Illinois practice act is a confession of judgment in a proceeding instituted without process, and has no reference whatever to a *cognovit actionem*, or confession of judgment signed by the defendant in the action after suit brought, which was resorted to at common law in many different kinds of actions.

CONFESSION OF JUDGMENT AT COMMON LAW, HOW RESTRICTED. — At common law, a confession of judgment without process or any action pending was by means of a warrant of attorney, and unless the amount was mentioned in the warrant itself was restricted to notes, bills, bonds, or other instruments or evidences of indebtedness wherein the amount for which the judgment was to be confessed was so specified that it could readily be determined by mere inspection or computation, and did not require judicial inquiry for its ascertainment.

JUDGMENTS BY CONFESSION — CLERK NOT INVESTED WITH JUDICIAL POWERS. Under section 66 of the Illinois practice act, which gives to the clerk authority to enter judgments by confession either in term time or vacation, he is not, and could not lawfully be, invested with power to ascertain from evidence *dehors* the instruments filed, the amounts for which judgments are to be entered. He has merely authority to examine the papers presented to and filed with him, for the purpose of ascertaining that the formal requirements of the law have been complied with, and has no power whatever to investigate further or adjudicate the amount due.

JUDGMENT BY CONFESSION FOR UNCERTAIN AND UNLIQUIDATED AMOUNT. — An unrestricted power, donated by warrant of attorney, to confess a judgment against the donor for an uncertain, unliquidated, and unlimited amount of money paid out for water rates, gas bills, and for cleaning demised premises and keeping them in a healthy condition, cannot lawfully be either given or exercised. A party cannot be permitted to coerce payment of a claim, however just, without the sanction of judicial authority.

JUDGMENTS, POWER TO CONFESS NOT EXTENDED BEYOND PROVISIONS OF STATUTE. — Sound public policy demands that the power of confessing judg-

ments under and by virtue of warrants of attorney should not be extended beyond the provisions of the statute and the decisions in the adjudicated cases.

JUDGMENT BY CONFESSION, VOID WHEN. — A warrant of attorney in a lease providing for the payment of a fixed amount of rent, in specified sums, at stated times, and that all water rates, gas bills, and expenses of keeping the premises in a healthy condition shall be additional rent, which undertakes to grant the power to waive process and the service thereof, and to confess judgment from time to time, for any rent then due by the terms of the lease, with costs, etc., attempts to authorize a proceeding unknown to the common law, and not contemplated by the statute, and a judgment of the court based on such warrant is *coram non judice* and void.

ON the 14th of July, 1887, the defendant in error, John W. Dyer, by a written lease demised to the plaintiffs in error, John Z. Little and Elizabeth C. Little, and one Charles O. White, the Standard Theater in Chicago, with the appurtenances and certain appliances and apparatus, for a term commencing September 1, 1887, and ending June 30, 1890. The lessees covenanted to pay thirty-six thousand dollars as rent, in installments of three hundred dollars at specified dates, and also all water rents, gas bills, cost of electric light, license fees, and personal-property taxes. The lease also provided that in case the water rates and gas bills were not paid as soon as due, the lessor might pay the same, which amounts, so paid, together with any amounts paid by him by reason of notice from the proper authorities to keep the demised premises in a clean and healthy condition, should be so much additional rent, and be due and payable with the next installment of rent due under the lease. The lease also contained this provision: "The party of the second part hereby irrevocably constitutes C. H. Remy, or any attorney of any court of record of this state, attorney for him, her, and them, in his, her, or their name, on default of any of the covenants herein, to enter his, her, or their appearance in any court of record, waive process and service thereof against any one or more or all of said parties of the second part, in favor of said party of the first part, for forcible detainer of said premises, with costs of said suit, or to confess judgment from time to time for any rent which may be then due by the terms of this lease, with costs, and to waive all errors and all rights of appeal from any such judgment or judgments."

On the 17th of May, 1889, Dyer filed in the superior court of Cook County his declaration in *assumpsit*, containing a special count against John Z. Little and Elizabeth C. Little.

The special count was based on the lease, and averred that the defendants did not pay said sums as agreed, and that there was due, *bona fide*, to the plaintiff from the defendants under the lease the sum of \$6,772.53. Dyer also filed the lease, with the declaration and affidavit, showing that there was due to him from the defendants, under the terms and conditions of the lease, over and above all set-offs, deductions, and counterclaims, the sum of \$6,772.53. C. H. Remy, thereupon, as attorney for the Littles, filed a *cognovit*, and therein entered their appearance and waived service of process, and confessed a judgment in favor of Dyer for \$6,772.53 damages, and stipulated that no appeal or writ of error should be prosecuted, and waived all errors, and consented to the issuance of immediate execution. The court forthwith, and without hearing any further evidence, rendered judgment in favor of Dyer and against the Littles for \$6,772.53 damages and for costs. At the same term of the court, on May 23, 1889, the plaintiffs in error, upon notice, moved to set aside and vacate the judgment, and to open up the judgment and permit them to defend the suit, and with the motions presented various affidavits. Both motions were overruled, and exceptions taken. The record was then taken to the appellate court by writ of error, but that court affirmed the judgment, and another writ of error brought the record to this court.

J. W. Merriam, for the plaintiffs in error.

Flower, Smith, and Musgrave, for the defendant in error.

BAKER, J. Section 66 of the practice act provides that "any person, for a debt *bona fide* due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process." The word "debt" in this statute is used as indicative of a sum certain that is owing from one person to another. This is manifest from several considerations. In the first place, the confession of judgment contemplated by said section is a confession of judgment in a proceeding instituted "without process," and therefore has no reference whatever to a *cognovit actionem*, or confession of judgment signed by the defendant in the action after suit brought, and which was resorted to, at common law, in many different kinds of actions; and at common law, a confession of judgment without process, or any action pending, was by means of a warrant of attorney, and, unless the amount was

mentioned in the warrant itself, was restricted to notes, bills, bonds, or other instruments or evidences of indebtedness wherein the amount for which the judgment was to be confessed was so specified that it could readily be determined by mere inspection or computation, and did not require judicial inquiry for its ascertainment. In the next place, the judgments provided for in the section are such as can be entered indifferently, "either in term time or vacation," and the authority to enter the judgments by confession is just as broadly given to the clerk acting in vacation as it is to the court acting in term time, and it needs no argument to show that the clerk is not invested with, and cannot, under the constitution, be lawfully invested with, power to ascertain, from evidence *dehors* the instruments filed, the amounts for which judgments are to be entered. The clerk merely has authority to examine the papers presented to and filed with him, for the purpose of ascertaining that the formal requirements of the law have been complied with, and that only, and has no power whatever to investigate further, or adjudicate the amount due.

In the case at bar, the authority specified in the warrant of attorney contained in the lease is "to waive process and service thereof," and "to confess judgment from time to time for any rent which may be then due by the terms of this lease, with costs, and to waive all errors and all right of appeal from any such judgment or judgments." It is to be noted that the power delegated is not to confess judgment for the thirty-six thousand dollars rent covenanted in the indenture to be paid, or judgment for any specified installment of three hundred dollars, or even judgment for any installment of three hundred dollars, or installments of three hundred dollars each, or part or parts of such installment or installments of three hundred dollars that may be due and unpaid, but "to confess judgment from time to time for any rent which may be then due by the terms of this lease"; and it is also to be noted, that by the terms of the lease it is expressly stipulated that all amounts paid by the lessor for water rates and gas bills, and for keeping the demised premises and appurtenances in a clean and healthy condition, shall be "so much additional rent," and due and payable as such.

It is manifest that in this case, and in view of the fact that amounts paid out by the lessor for water rates and gas bills, and for keeping the premises in a clean and healthy condition, are expressly made "so much additional rent," and

"rent due by the terms of the lease," there must, necessarily, be a judicial investigation and hearing of evidence other than that afforded by the lease itself, in order to determine the amount of "rent due by the terms" of the indenture. This must be so, unless it can be said that the lease and warrant of attorney in the case give authority to the lessor or his attorney to adjudicate and fix the amount due, or give such authority to "C. H. Remy, or any attorney of any court of record in this state." It would be absurd to contend that such unrestricted power was given to the creditor or his attorney, and a rule such as that would be in the highest degree productive of fraud and subversive of justice, and would be tantamount to making one of the parties in interest not only both plaintiff and defendant, but court also, — and that, too, in his own cause; and that such authority was vested in "Remy, or any attorney of any court of record in this state," would stand, in its practical results, upon substantially the same footing, since the lessor and creditor would have the option of selecting the attorney to represent the lessee and debtor.

The authority that was here exercised by the attorney acting under the power claimed to be donated by the warrant of attorney was a power to confess a judgment against the donor of the power for an uncertain, unliquidated, and unlimited amount of money paid out for water rates and gas bills, and for cleaning the demised premises and appurtenances, and keeping them in a clean and healthy condition, to say nothing of any element of uncertainty that might arise in respect to what portion of the stipulated thirty-six thousand dollars was unpaid. A power so unrestricted cannot lawfully be either given or exercised. Though a demand be ever so just, a party ought not to be permitted to coerce payment without the sanction of judicial authority. To hold the power valid, and that the attorney might waive all errors and all right of appeal, would be to open the business transactions of men to infinite abuse. On grounds of sound public policy we are not disposed to extend the power of confessing judgments under and by virtue of warrants of attorney beyond the provisions of the statute and the decisions in the adjudicated cases.

It is claimed by counsel for defendant in error that there is no more presumption that the face of a promissory note remains unpaid than that the stipulated rent in a lease remains unpaid. It is claimed by counsel for plaintiffs in error that after a most diligent search they have been unable to find

any reported case where judgment has been entered for rent on a lease by confession under a warrant of attorney. Be these several contentions as they may, they are not of controlling importance here. The rent covered by the power contained in this lease includes not only the thirty-six thousand dollars and the installments of three hundred dollars each mentioned in the indenture, but also the unliquidated sums that may be paid by the lessor for water rates, for gas bills, and for keeping clean and in a healthy condition the demised premises and appurtenances, and therefore the question whether a power to confess judgment for installments of a certain and fixed rent, and for such installments only, is a valid power, does not arise in the case, and for that reason we refrain from the expression of an opinion in regard thereto.

A case that is here much in point is that of *Nichols v. Hewit*, 4 Johns. 423. There a judgment was entered on the confession of a party for such sum as A and B should award, before the award was declared, and it was held that the judgment was bad, and reversible on error. The court there said that a confession of judgment ought to be for a certain and specified sum, and that there was no power to enter judgment on a *cognovit* for an uncertain and unliquidated amount. If a party cannot, by his own *cognovit actionem*, and after suit brought, confess judgment for an uncertain sum, it would seem that he cannot, where there is no action pending, by a warrant of attorney authorize another to confess judgment for an uncertain and unliquidated sum.

Our conclusion is, that the warrant of attorney contained in the lease here in question attempted to authorize a proceeding which was unknown to the common law and not contemplated by the statute, and that the judgment of the court based on said warrant of attorney was *coram non judice*, and void.

The view we have taken of the case obviates the necessity of considering numerous other objections to the judgment that are suggested in the briefs and arguments of counsel.

The judgments of the appellate court and of the superior court are reversed. The cause is remanded to the latter court with directions to allow plaintiffs in error to plead to the declaration.

Judgment reversed.

WILKIN and BAILEY, JJ., dissenting.

AM. ST. REP., VOL. XXXII.—10.

DEBT — DEFINITION. — The liability of a corporation for an infringement of letters patent is not before judgment a "debt" for which the officers are liable: *Child v. Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328. A claim in tort, not a judgment, is not a "debt" within the meaning of the statute as to foreign attachment: *Holcomb v. Winchester*, 52 Conn. 447; 52 Am. Rep. 608. A tax is not a "debt": *Gutting v. Commissioners*, 92 N. C. 536; 53 Am. Rep. 432. A fine for contempt is not a debt within the meaning of the statute providing that no one shall be imprisoned for debt: *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207. See also *Dunsmoor v. Furstenfeldt*, 88 Cal. 522; 22 Am. St. Rep. 331.

CLERKS OF COURT — NO JUDICIAL POWER. — The clerk may extend the records of the court, but only from the process and pleadings on file, and not from the minutes and entries on the docket, and not from any extrinsic evidence: *Frink v. Frink*, 43 N. H. 508; 80 Am. Dec. 189, and note. A clerk of court has no authority to receive money in discharge of an action pending or which may probably be brought in the future: *Ball v. Bank*, 8 Ala. 590; 42 Am. Dec. 649.

JUDGMENTS BY CONFESSION — CONSTRUCTION OF WARRANT OF ATTORNEY. A warrant of attorney to confess judgment must be strictly construed: *Spence v. Emerine*, 46 Ohio St. 433; 15 Am. St. Rep. 634, and note; note to *Davenport v. Parsons*, 81 Am. Dec. 777.

JUDGMENTS BY CONFESSION WHEN VOID AND WHEN VALID: See extended note to *Lee v. Figg*, 99 Am. Dec. 275; also note to *Chappel v. Chappel*, 64 Am. Dec. 501.

PALMER v. PEOPLE.

[138 ILLINOIS, 356.]

INDICTMENT FOR MURDER NEED NOT AVER THAT DECEASED WAS A HUMAN BEING. — An indictment for the murder of one George Bopp need not aver that the deceased was a human being; the name imports a human being.

INDICTMENT — TIME AND PLACE, SUFFICIENT ALLEGATION OF. — Where one fact is alleged in an indictment, with the time and place, the words "then and there," subsequently used as to the occurrence of another fact, refer to the same point of time, and necessarily import that the two were co-existent; and it is sufficient if these words are repeated to every other material fact set up in the indictment.

INDICTMENT — MANNER AND MEANS OF DEATH, SUFFICIENT ALLEGATION OF. An allegation, in an indictment for murder, that the defendant, "with a certain revolver loaded with gunpowder and leaden bullets, which he, the said T. P., then and there held in his hand, he, the said T. P., did then and there feloniously, unlawfully, willfully, and of his malice aforethought, shoot off and discharge at and upon the said G. B., thereby and by thus striking the said G. B. with one leaden bullet thus discharged from the revolver in the hand of the said G. B., inflicting on and in the right side of him, the said G. B., one mortal wound," etc., plainly shows that the deceased was struck with the bullet discharged from the revolver. No particular word or phrase need show the manner and means of death, if such fact is made plainly to appear.

INDICTMENT — DEATH FROM MORTAL WOUND GIVEN, SUFFICIENT ALLEGATION OF. — Where an indictment alleges that a wound was given one day, and that the deceased languished or grew weaker until the next day, and died, this is sufficient to show that he died of the mortal wound given, of which he languished to death; and the respective dates of the stroke and of the death are sufficiently stated.

INDICTMENT FOR MURDER, SUFFICIENT WHEN. — The conclusion of an indictment for murder in the words "and so the said T. P. did, in the manner and form aforesaid, feloniously, unlawfully, willfully, and of his malice aforethought, the said G. B. kill and murder," etc., is sufficient, without charging "and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said T. P. did," etc., when the omitted words appear at the beginning of the indictment. Their repetition at the conclusion is not necessary.

MANSLAUGHTER, EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION FOR. — On a trial for murder, evidence showing that a warrant for the arrest of the defendant on a charge of bastardy had been issued by a justice of the peace, and placed in the hands of the deceased, who was a constable, for his arrest, that the defendant, expecting such a warrant, armed himself for the express purpose of resisting arrest, and shot and killed the deceased upon his attempting to make the arrest, is sufficient to sustain a verdict finding him guilty of manslaughter.

EVIDENCE — DEFECTIVE WARRANT ADMISSIBLE FOR WHAT PURPOSE. — On the trial of a defendant for the murder of a constable while attempting to arrest him on a bastardy warrant, defective in not having a seal attached thereto, where the defendant claims that the killing was in self-defense, and in resistance to a supposed hostile movement of the deceased when the latter stretched out his arm, the warrant, although technically defective in the matter of a seal, is admissible in evidence for the prosecution to show that the movement of the deceased toward the defendant was made for a lawful purpose, and under authority of a writ which was supposed by him to confer the right to make the arrest.

EVIDENCE — STATEMENTS OF DEFENDANT SHOWING MALICE AND ANIMUS. — Where, on the trial for the murder of a constable while attempting to arrest the defendant upon a bastardy warrant, the warrant has been introduced in evidence, evidence that, two days prior to the killing, the defendant, upon seeing a person who had been a constable, said, "I believe he is going to arrest me," and, drawing a revolver from his pocket, added, "If he tries to arrest me, he will hear from this," is admissible as tending to show malice against any officer of the law who might attempt to arrest him, and his premeditated design to make resistance to the arrest which he expected, and, taken in connection with his exhibition of a deadly weapon, as showing his animus.

MURDER — KILLING OF CONSTABLE WHILE ATTEMPTING TO ARREST UNDER WARRANT WITHOUT SEAL. — Where a person expecting a warrant for his arrest on a charge of bastardy forms a malicious intention to resist and kill any officer who shall attempt to arrest him on that charge, and in furtherance of that intention does shoot and kill a constable while attempting his arrest, knowing and believing that the deceased only intended to arrest him on that charge, and not in self-defense, he will be guilty of murder, notwithstanding the fact that the warrant was illegal in having no seal.

MURDER — THREATS, EVIDENCE OF ADMISSIBLE, THOUGH NOT KNOWN TO DECEASED, WHEN. — Where a person makes a threat to use a revolver upon another whom he believes to be a constable, in case he should attempt to arrest him, evidence of such threat will be admissible against him on his trial for the subsequent killing of a constable while attempting to arrest him, as tending to show malice and evil intention on his part, and to give character to his act in killing the deceased, whether the latter knew of his threats or not.

JURY TRIAL — INSTRUCTIONS INCONSISTENT OR REPEATED. — An instruction which is inconsistent with others already asked is properly refused, and so is one that assumes a fact contrary to the evidence of the party asking it, and whose substance has been already given in another instruction.

JURY TRIAL — IMPROPER REMARKS OF COUNSEL NOT GROUND FOR REVERSAL, WHEN. — Improper remarks made by the state's attorney in his closing address in a criminal trial cannot injure the defendant, and are not, therefore, ground for reversal of the judgment, where, upon the defendant's objecting to such remarks, the court directs the counsel to confine his remarks to the record, and charges the jury that it is their duty to give no consideration whatever to such remarks and that the same are withdrawn from them as not being proper for their consideration. While it is the duty of the trial judge to see that the line of argument is kept within reasonable bounds, and not to allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial, at the same time unreasonable restrictions must not be placed upon a legitimate presentation of the evidence, and comment upon testimony and the statement of fair inferences from proven facts come within the province of a just and lawful prosecution.

JURY TRIAL — READING AUTHORITIES TO JURY, WHEN PERMISSIBLE. — When the defendant's counsel, in arguing the case to the jury on a criminal trial, reads from and comments upon legal authorities, the state's attorney may reply to the propositions of law advanced by reading what another author has said in answer to such view of the same proposition.

JURY TRIAL — IMPEACHMENT OF VERDICT BY AFFIDAVIT OF JURORS NOT ALLOWED. — Affidavits of jurymen, or affidavits as to statements made by them, cannot be received to impeach their verdict.

E. Callahan, for the plaintiff in error.

George Hunt, attorney-general, and *S. J. Gee*, state's attorney, for the people.

MAGRUDER, C. J. This is an indictment against the plaintiff in error for murder. The jury found him guilty of manslaughter and fixed his punishment at imprisonment in the penitentiary for twenty years. After overruling motions for new trial and in arrest of judgment, the court gave sentence and judgment upon the verdict. The indictment consisted of three counts. The first and third counts were quashed on motion of the defendant, but the motion to quash was overruled as to the second count, and exception taken.

The first objection made to the second count of the indictment, as set forth in the motions to quash and in arrest, is that it contains no allegation that George Bopp, alleged to have been killed by the defendant, was a human being. This allegation is said to be necessary because section 140 of the criminal code defines murder to be "the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied." It need not be averred that the deceased was a human being. The name imports a human being. The language of the indictment, and the name applied to the deceased, are always used to describe human beings: *State v. Stanley*, 33 Iowa, 526; *Merrick v. State*, 63 Ind. 327; 9 Am. & Eng. Ency. of Law, p. 638, and cases referred to in note 9.

We think that the allegation of time and place as expressed by the words "then and there" is sufficiently repeated to every material fact set up in the count. The rule is, that, where one fact is alleged in the indictment with time and place, the words "then and there," subsequently used as to the occurrence of another fact, refer to the same point of time and necessarily import that the two were co-existent: *State v. Hurley*, 71 Me. 354; 10 Am. & Eng. Ency. of Law, p. 588.

Certain language in the count is said to contain no allegation that the deceased was struck with or by the leaden bullet therein referred to, and is objected to on that account. The language thus complained of is as follows: "And the said Thomas Palmer with a certain revolver loaded with gunpowder and leaden bullets, which he, the said Thomas Palmer, then and there held in his hand, he, the said Thomas Palmer, did then and there feloniously, unlawfully, willfully, and of his malice aforethought, shoot off and discharge at and upon the said George Bopp, thereby and by thus striking the said George Bopp with one leaden bullet thus discharged from the revolver in the hand of the said Thomas Palmer inflicting on and in the right side of him, the said George Bopp, one mortal wound," etc. The plain meaning of these words is that the said George Bopp was struck with the bullet discharged from the revolver. "No particular word or phrase need show the manner and means of death, if such fact is made plainly to appear": 9 Am. & Eng. Ency. of Law, p. 631.

The mortal wound was given one day and the deceased languished or grew weaker until the next day, and died. It is clear that he died of the mortal wound given, of which he

languished to death. The respective dates of the stroke and of the death are sufficiently stated: *Lutz v. Commonwealth*, 29 Pa. St. 441; 2 Bishop's Crim. Proc., sec. 528; Bishop's Directions and Forms, sec. 520; *State v. Conley*, 39 Me. 78; *State v. Haney*, 67 N. C. 467; 9 Am. & Eng. Ency. of Law, 636.

The second count closes as follows: "And so the said Thomas Palmer did, in the manner and form aforesaid, feloniously, unlawfully, willfully, and of his malice aforethought, the said George Bopp kill and murder, contrary to the form of the statute," etc. It is claimed that this conclusion is erroneous, because it does not begin as follows: "And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Thomas Palmer did," etc. The omitted words appear at the beginning of the count, and their repetition at the conclusion was not necessary: See form on page 284 of Bishop's Directions and Forms.

It is alleged that the evidence does not sustain the verdict. After a careful examination of all the testimony, we see nothing to indicate that the jury was influenced by prejudice or passion. A warrant had been issued by a justice of the peace for the arrest of the defendant upon a charge of bastardy and placed in the hands of the deceased, who was a constable. It was proven that the defendant expected such a warrant to be issued, and armed himself for the announced purpose of resisting arrest. The deceased, who went to the house where the defendant lived for the purpose of arresting him, found him absent, and was told that he had gone to Kansas, when in fact he was in attendance upon a meeting at a school-house located a short distance from his home. While the deceased was searching for him, a member of the family ran to the school-house and warned him that the constable was in search of him. The defendant, being thus warned, left the school-house, and was met on the road by George Bopp, the deceased, who, as a constable, and under the authority of the writ, attempted to make the arrest. Thereupon, the defendant drew a pistol and fired a bullet into the body of the constable, and killed him. We are unable to say that the evidence does not sustain the verdict. It so far tends to show the guilt of the defendant that we would not be justified in setting aside the verdict upon the questions of fact involved.

It is said that the court erred in allowing the evidence of one Thackery to go to the jury. Thackery swore that on the evening of December 24, 1889, two days before Bopp was shot,

he went out into the road with the defendant from an entertainment they were attending, when they passed one Newman, who had been a constable; that, upon seeing Newman, the defendant remarked: "Newman aims to arrest me. . . . Yes, I believe he is going to arrest me"; that defendant then pulled a revolver from his "hip-pocket" and said: "If he tries to arrest me he will hear from this"; that defendant then put the revolver in his pocket, and said that "he had got into trouble with a girl, and was going to leave the next evening." It is proven that the defendant did leave the state of Illinois after killing Bopp, and was found in Missouri bearing an assumed name, and was brought back to this state upon a requisition. Before Thackery testified, the warrant referred to had been introduced in evidence. The warrant is as follows:—

"The people of the state of Illinois to the sheriff or any constable of said county: Whereas Clara J. Lee, of Lawrence County, Illinois, an unmarried woman, has this day made complaint under oath before H. W. Bunn, a justice of the peace in and for said county, that she is pregnant with child, which is liable to be born a bastard, and Thomas E. Palmer is the father of said child, we therefore command you to arrest the said Thomas E. Palmer and bring him before said justice to answer unto said complaint, and to be further dealt with according to law. Given under my hand and seal of said justice this twenty-sixth day of December, 1889.

"H. W. BUNN."

The testimony of Thackery was objected to as being irrelevant to the issues; and the warrant was objected to upon the ground that it was not under the seal of the magistrate.

It was proper to introduce the warrant in order to show why the deceased put his hand upon, or attempted to put his hand upon, the defendant. It was the theory of the defense, that the defendant fired his pistol in self-defense, and in resistance to a supposed hostile movement of the deceased when the latter stretched out his arm. It was proper to show that Bopp's movement toward the defendant was made for a lawful purpose, and under authority of a writ, which, though technically defective in the matter of a seal, was supposed by him to confer the right to make the arrest.

The evidence of Thackery was properly admitted. It tended to show the malice of the defendant, not perhaps toward Bopp individually, but toward any officer of the law who

should attempt to arrest him. The words which he addressed to Thackery, taken in connection with his exhibition of a deadly weapon, showed his animus, and also tended to show a premeditated design to make resistance to the arrest which he expected, and of which he afterward received warning at the school-house just before meeting the constable.

Plaintiff in error makes objection to the ninth, tenth, and thirteenth instructions given for the people, because they refer to the charge of bastardy. We see no error in these instructions. They told the jury in substance, that, if they believed, from the evidence, beyond a reasonable doubt, that Bopp, acting as a constable, undertook to arrest the defendant in pursuance of a warrant on a charge of bastardy, and that the defendant, prior to the killing, had formed a malicious intention to resist and kill any officer who should attempt to arrest him on that charge, and knew and believed that Bopp only intended to arrest him and carry him before a justice to answer to the complaint made against him, and that he shot and killed Bopp in resistance to said arrest and not in self-defense, then such killing would be murder, notwithstanding the fact that the warrant was illegal in having no seal.

The instructions thus given for the people could have done the defendant no harm, in view of the following instructions, which, whether they were in all respects correct or not, were given for him at his own request:—

15. "Under the law a warrant for the arrest of a person charged with bastardy must be under the hand and seal of the magistrate who issues such warrant. If the evidence in this case shows that George Bopp was killed while attempting to arrest the defendant by virtue of a bastardy warrant, which was not under the seal of the magistrate who issued the warrant, in contemplation of law, he had no warrant at all."

18. "A man is not bound to submit to an unlawful arrest. He may stand his ground and repel force by force, taking care that the force he employs does not exceed the bounds of mere defense and prevention, and that it does not become erroneously disproportionate to the injury threatened."

11. "If an officer, in attempting to make an arrest under a void warrant, makes an assault upon the party sought to be arrested, in such a manner as would indicate to a reasonable person an intention to take life or do great bodily harm, the person assaulted, if he in good faith acts under the influence of an actual fear that he is about to lose his life or receive

great bodily harm, may resist with such force or weapons as may be available to him at the time."

Plaintiff in error complains that the court refused to instruct the jury that they should not consider a threat made to Thackery against Newman, unless the evidence showed that such threat was communicated or known to Bopp. There was no error in such refusal. The threat was not so much against Newman as against any officer who should attempt to make the arrest, and it tended to show malice and evil intention on his part, and to give character to his act in shooting the deceased, whether the latter knew of his remarks to Thackery or not. There is no question about the fact that the killing was done by the defendant. He admits in his testimony that he killed Bopp.

The second of defendant's refused instructions was properly refused, because it assumes the warrant to be valid when he had just asked several instructions to the effect that it was invalid, and because it assumes that Bopp used deadly weapons in making the arrest, when the defendant himself in his own testimony does not say that Bopp had any weapon in his hand when he stretched out his arm to make the arrest, and because all that was material in the refused instruction was contained in the sixth instruction given for the defendant.

The refusal of the second of defendant's refused instructions upon the subject of reasonable doubt could have done the defendant no harm, as, in the tenth and twenty-fourth instructions given for the defendant, reasonable doubt was correctly defined in language which has been several times approved by this court: *Vide Dunn v. People*, 109 Ill. 635, and cases there cited.

We cannot see that the closing remarks of the state's attorney could have injured the defendant in view of the fact that when the defendant excepted to them the court directed counsel to confine his remarks to the record, and charged the jury that it was their duty to give no consideration whatever to such remarks, and that the same were withdrawn from them as not being proper for their consideration. The remarks objected to had reference to the charge of bastardy made against defendant. The fact of such charge was not first brought to the notice of the jury by the address of counsel. It was already in evidence, because it was a part of the warrant that had been introduced, and the subject was before the

minds of the jury from the very necessities of the case, if counsel had made no reference to it. The defendant himself referred to the "bastardy" warrant in the fifteenth instruction given for him, as above quoted. Moreover, the evidence showed defendant's own admission, that "he had got into trouble with a girl and was going to leave" the state. While it is the duty of the trial judge to see that the line of argument is kept within reasonable bounds, and not to allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial, at the same time unreasonable restrictions must not be placed upon a legitimate presentation of the evidence. Comment upon testimony and the statement of fair inferences from proven facts come within the province of a just and lawful prosecution.

The reference to authorities by the counsel for the prosecution in his closing address was merely to the comments made by such authorities upon the decisions of courts and the texts of authors, which had been previously read by defendant's counsel. No new propositions of law were presented to the jury. If the defendant's counsel read one view of a proposition of law to the jury from one author, counsel for the prosecution did not go beyond the proper limits if, instead of attempting to answer the proposition in his own language, he merely read what another author had said in answer to such view of the same proposition.

It is insisted that a new trial should have been granted by reason of the statements made in certain affidavits filed in support of the motion for a new trial. These affidavits seek to show that the jury arrived at the period of punishment by a resort to chance. If the statements in the affidavits were competent to impeach the verdict, the affidavits do not sustain the charge. A paper with figures upon it was picked up in the jury room after the verdict was rendered. One Sage made affidavit that M. A. Propes, one of the jurymen, told him that each juror put down the number of years he was in favor of, and that all the numbers were added together and divided by twelve, leaving a quotient of twenty. Propes files an affidavit denying that the verdict was brought about in any such way, and saying that the term was fixed as the result of judgment and deliberation by all the jurors. Several other jurors make affidavits to the same effect. The only other affidavit, making the same statement as that made by Sage, is that of one Kitchen, who swore that he heard two of the jurymen say

what Propes is alleged to have said, but Kitchen afterwards makes another affidavit substantially retracting what he had first sworn to, and saying that he was not positive about his former statements, and that his recollection was not clear; but we have held in a number of cases that affidavits of jurymen will not be received to impeach their verdict: *Martin v. Ehrenfels*, 24 Ill. 187; *Reins v. People*, 30 Ill. 256; *Reed v. Thompson*, 88 Ill. 245; *Cummins v. Crawford*, 88 Ill. 312; 30 Am. Rep. 558. Nor will affidavits as to statements made by jurymen be received to impeach their verdict: *Allison v. People*, 45 Ill. 37; *Niccolls v. Foster*, 89 Ill. 386.

The judgment of the circuit court is affirmed.

HOMICIDE — SUFFICIENCY OF INDICTMENT: See extended note to *Schaffer v. State*, 3 Am. St. Rep. 279; note to *People v. Aro*, 65 Am. Dec. 505.

HOMICIDE — INDICTMENT — SUFFICIENCY OF — AVERMENT AS TO MANNER AND MEANS OF KILLING: See *State v. Jenkins*, 14 Rich. 215; 94 Am. Dec. 133, and note; *Dukes v. State*, 11 Ind. 557; 71 Am. Dec. 370, and note; *Sutcliffe v. State*, 18 Ohio, 469; 51 Am. Dec. 459.

MANSLAUGHTER — KILLING OFFICER WHILE RESISTING ARREST. — Killing in resisting illegal arrest is manslaughter: *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454, and note. See also *Creighton v. Commonwealth*, 84 Ky. 103; 4 Am. St. Rep. 193, and note.

HOMICIDE — KILLING OFFICER WHILE RESISTING ARREST. — Where an officer is killed, with knowledge or reasonable grounds of belief that he intended to make an arrest for a felony with which the accused is charged, it is murder: *Croom v. State*, 85 Ga. 718; 21 Am. St. Rep. 179, and note; *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note with cases collected; *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645, and note.

HOMICIDE — THREATS OF DECEASED — ADMISSIBILITY IN EVIDENCE: See *State v. Ellis*, 101 N. C. 765; 9 Am. St. Rep. 49, and note; *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 233, and note with cases collected.

TRIAL — IMPROPER ARGUMENT TO JURY BY STATE'S ATTORNEY. — Improper remarks of the attorney for the prosecution in his argument in a criminal case, though reprehensible, are not necessarily cause for a reversal, unless the rights of the accused were calculated to be prejudiced thereby: *Ruth v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911, and note discussing the subject; extended notes to *McConnell v. State*, 58 Am. Rep. 648; *Martin v. State*, 56 Am. Rep. 814; *Cleveland Paper Co. v. Banks*, 48 Am. Rep. 336.

JURY TRIAL. — For a discussion of the question of reading authorities to the jury, see *Union Central etc. Ins. Co. v. Chaeer*, 38 Am. Rep. 577, and extended note; *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51, and note. See also *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85.

FRITZ v. FRITZ.

[138 ILLINOIS, 436.]

DIVORCE—DESERTION AS GROUND FOR—WHAT CONSTITUTES.—Under the Illinois statute, the desertion or absence which will justify a divorce must be without any reasonable cause, and the reasonable cause which will justify desertion and abandonment must be such as would entitle the party deserted to a divorce.

DIVORCE—DESERTION—REFUSAL OF SEXUAL INTERCOURSE.—The refusal of a wife, without sufficient reason, to have sexual intercourse with her husband for a period of two years or more does not constitute willful desertion within the meaning of the Illinois statute relating to divorce. The willful desertion which is made a ground of divorce means the abnegation of all the duties of the marital relation, and not of one only.

DIVORCE—EXTREME AND REPEATED CRUELTY, WHAT CONSTITUTES.—One act of force and violence, preceded by insult and abuse, does not constitute such extreme and repeated cruelty as will justify a divorce. No one act of personal violence, although coupled with abusive and derogatory language, constitutes a ground of divorce.

James C. Courtney, and Sheridan and Moore, for the appellant.

W. S. Morris, for the appellee.

MAGRUDER, C. J. This is a bill filed in the circuit court of Pope county on April 17, 1889, by the appellant against the appellee, his wife, praying for a divorce from her upon the alleged grounds, that she "has willfully absented herself from your orator without any reasonable cause for the space of two years, and has been guilty of extreme and repeated cruelty." The defendant answered denying the allegations of the bill, and replication was filed to the answer. The verdict of the jury and the judgment of the trial court were in favor of the defendant. The present appeal is from the judgment of the appellate court affirming the judgment of the circuit court.

The first question in the case arises out of the refusal of the trial court to give the third, fourth, fifth, sixth, and seventh instructions asked by the complainant below. These instructions, in substance, announce the doctrine, that, where a wife refuses, without good cause, to have sexual intercourse with her husband for a period of two years or more, such conduct amounts to willful desertion. Mr. Bishop, in his very able work upon marriage and divorce, give this doctrine his support: 1 Bishop on Marriage and Divorce, 6th ed., secs. 778, 778a, 779. It is not, however, sustained by well-considered authorities. The cases favoring it, to which we have been referred, are *Harmance v. James*, 47 Barb. 120; *Fishli v. Fishli*,

2 Litt. 337; *Sisemore v. Sisemore*, 17 Or. 542. In no one of these cases did the question fairly arise, whether the neglect of this one of the marital duties, without the neglect of any other of such duties, by itself constituted willful desertion. The Harman case was an action for damages for depriving the plaintiff of the affections, comfort, fellowship, society, and aid and assistance of his wife in his domestic affairs, and arose upon demurrer to the complaint filed in the action. In the Fishli case, the husband had abandoned his wife for the space of two years, and sought to meet the charge of such abandonment by setting up, that, a few weeks before the expiration of the two years, he made an offer to support his wife in his own house, or in lodgings, as she might prefer. In the Sisemore case, it appeared that the offense of the wife was not so much the one now under consideration, as her refusal to remove to a new home selected by her husband in another county.

The doctrine contended for rests mainly upon the idea that sexual intercourse is "the central element of marriage to which the rest is but ancillary," and, while it may be urged with no little force that the refusal of such intercourse by one of the parties to the marriage contract is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question before us is simply as to the meaning of our statute. The divorce act provides that a divorce may be granted where either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years." We think that the willful desertion here referred to was intended to mean the abnegation of all the duties of the marital relation, and not of one alone.

In *Carter v. Carter*, 62 Ill. 439, desertion is treated as synonymous with absence, and absence involves the neglect of other duties than the one in question. The supreme court of Maine, in speaking upon this subject, says: "Sexual intercourse is only one marital right or duty. There are many other important rights and duties. The obligations the parties assume to each other and to society are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced or their breach remedied by legal process": *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822.

The view of this subject which commends itself to our ap-

proval is that announced by the supreme court of Massachusetts in *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95, where Chief Justice Bigelow says: "The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation,—a refusal to live together,—which involves an abnegation of all the duties and obligations resulting from the marriage contract." The later case of *Magrath v. Magrath*, 103 Mass. 577, 4 Am. Rep. 579, does not overrule the *Southwick* case, in so far as the latter holds that the refusal of matrimonial intercourse is not of itself sufficient to justify a divorce on the ground of desertion. The divorce for desertion was allowed in the *Magrath* case because, in addition to the husband's intentional and permanent abandonment of all matrimonial intercourse with his wife, he withdrew from her his companionship and the protection of his home. It is there said, after referring to the *Southwick* case: "The case at bar goes much further. Here there has been for the time required by the statute an abnegation on the part of the husband of all the chief duties and obligations which result from the marriage contract and distinguish it from others. There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home."

The same view has been adopted in Maine. In *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, it is said: "This case, therefore, presents the question whether the legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years. . . . It has been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion: *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95; *Steele v. Steele*, 1 McAr. 505. . . . We do not think our legislature intended to call the denial of this one obligation an 'utter desertion,' while the party might be faithfully and perhaps meritoriously fulfilling all the other marital obligations."

Some importance is attached in the *Stewart* case to the fact that the Maine statute uses the word "utter" before "desertion." But we do not think that the absence of that word from our statute affects the construction of its language with reference to the point now under consideration. It is a mis-

take to say, as it is stated in *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, and in Bishop on Marriage, Divorce, and Separation, sec. 1680, that the Southwick case is based upon a statute providing for "utter" desertion. The Southwick case was decided in 1867, before the Massachusetts statute of 1882, referred to in *Stewart v. Stewart*, was passed, and the statute in force in Massachusetts in 1867 did not use the word "utter," as is shown by the remarks of the court in *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95. In our opinion, refusal of sexual intercourse alone cannot be construed to mean willful desertion without reasonable cause under the Illinois statute any more than it can be construed to mean utter desertion under the Maine statute.

In harmony with the Massachusetts and Maine cases is the case of *Steele v. Steele*, 1 McAr. 505, where it was the opinion of the court that a husband could not maintain a suit for divorce solely on the ground that his wife had denied matrimonial intercourse to him.

In Kent's Commentaries, 12th ed., vol. 2, lecture 27, marginal page 128, note 1, it is said: "Keeping a separate bed-chamber in the same house and refusing to have sexual intercourse for the statutory time is not desertion: *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95; *Eshbach v. Eshbach*, 23 Pa. St. 343; see Prithard's Dig., Desertion, note 4."

At common law, whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other without any sufficient reason, a suit could be brought in the ecclesiastical courts for a restitution of conjugal rights; but those courts made a distinction between "marital intercourse," or sexual intercourse, and "marital cohabitation," or living together. They enforced the latter, but not the former. They merely required the offending party to return and live with the libellant. In such proceedings the cessation of cohabitation warranted a decree, but the suit for restitution of conjugal rights could not be maintained on the ground of a refusal of marital intercourse. Desertion in such suits was held to signify a refusal to live together, and in this country the action for divorce on the ground of desertion is a substitute for the English proceeding for the restitution of conjugal rights: Bla. Com., book 3, marginal page 94; 1 Bishop on Marriage and Divorce, 6th ed., sec. 778; *Orme v. Orme*, 2 Add. Ecc. 382; *Forster v. Forster*, 2 Hagg. Const. 144, 154; *Stewart v.*

Stewart, 78 Me. 548; 57 Am. Rep. 822; *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95.

It will be noted that under our statute the desertion or absence which will justify a divorce must be "without any reasonable cause." It has been held that the "reasonable cause which justifies a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce": *Eshbach v. Eshbach*, 23 Pa. St. 343. It has also been held that the refusal of marital intercourse without sufficient reason will not justify desertion: *Reid v. Reid*, 21 N. J. Eq. 331; *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822; Browne's Commentaries on Law of Divorce and Alimony, 153. It follows that the denial of marital intercourse will not entitle a husband or wife to a divorce and therefore cannot be regarded as such desertion as is contemplated by the statute. In this state courts derive their power to decree divorces solely from the statute, and for such causes only as have been designated by the legislature.

For the reasons thus stated, we are of the opinion that the court below committed no error in refusing to give the instructions numbered 3, 4, 5, 6, and 7, which were asked by the complainant.

The appellant assigns as error that the trial court refused to give the second instruction asked by the complainant, and gave the eighteenth instruction asked by the defendant. The second and last clause of said second instruction is as follows: "Whenever force and violence, preceded by deliberate insult and abuse, have been once or twice, wantonly and without provocation, used by the wife to her husband, then the wife would be guilty in law of extreme and repeated cruelty." This clause announces the proposition that one act of force and violence preceded by insult and abuse constitutes extreme and repeated cruelty. The eighteenth instruction given for the defendant announced the contrary of such proposition. We do not think that the error thus complained of is well assigned.

In the late work of Bishop on Marriage, Divorce, and Separation, vol. 1, sec. 1608, it is said: "The words in Illinois are 'extreme and repeated cruelty'; and it is plain that a single act, though it may be 'extreme' in point of cruelty, is not therefore 'repeated.' The consequence of which is, that there can be no one act of violence which alone will bring a case within this statute."

In *Vignos v. Vignos*, 15 Ill. 186, one act of violence, together with unkind treatment and the use of harsh language, was held to come far short of what the statute means by "extreme and repeated cruelty."

In *Harman v. Harman*, 16 Ill. 85, we said: "This court in *Birkby v. Solomons*, 15 Ill. 120, and in *Vignos v. Vignos*, 15 Ill. 186, have held that one instance of personal violence did not constitute a statutory cause, although coupled with abusive and derogatory language.

In *De La Hay v. De La Hay*, 21 Ill. 252, we said: "And when the legislature has said that cruelty must be extreme and repeated, to constitute a ground, the courts cannot say that a single act will suffice." See also *Turbitt v. Turbitt*, 21 Ill. 438.

In *Embree v. Embree*, 53 Ill. 394, this court, speaking through Mr. Justice Walker, said: "It is a positive requirement of the statute that there shall be extreme and repeated cruelty to authorize the courts to dissolve the marriage tie. One act has not, in this state, been held to answer the requirements of the statute; and the uniform construction given to the act by this court . . . is, that the cruelty must consist in physical violence, and not in angry or abusive epithets, or even profane language."

In *Farnham v. Farnham*, 73 Ill. 497, although abusive language, used by a husband toward his wife in private or in the presence of strangers, which consisted of false charges against her virtue and fidelity to her marriage vows, was allowed to be considered by the jury as characterizing his acts of physical cruelty, yet two distinct acts of personal violence to the wife were clearly proven.

In *Henderson v. Henderson*, 88 Ill. 248, we again said: "This court . . . has held that it (extreme and repeated cruelty) must be bodily harm, in contradiction to mere harsh or even opprobrious language or mere mental suffering—that the cruelty must be grave and endanger life or limb, or at any rate subject the person to danger of great bodily harm." See also *Coursey v. Coursey*, 60 Ill. 186.

In *Ward v. Ward*, 103 Ill. 477, although it is said that extreme and protracted suffering might be produced primarily by operating on the mind alone, and that threats of physical violence and false charges of adultery maliciously made were competent evidence to prove cruelty, yet it is at the same time the plain doctrine of that case that the threats must be such

as raise a reasonable apprehension of bodily hurt, and must be accompanied or followed by acts of actual malicious physical violence, and must serve to magnify the atrocity of such acts. It is also there said that any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and that "many acts" are not necessary to constitute such extreme cruelty, yet it is nowhere intimated that there can be repeated cruelty without more than one act of violence. On the contrary, the Farnham case is quoted with approval in the Ward case, and the proof in the latter case showed that the husband had committed four or five distinct assaults and batteries upon his wife, apparently without provocation, and, in addition thereto, had insulted and abused her constantly for three years.

Even in *Sharp v. Sharp*, 116 Ill. 509, where the circumstances were peculiar and of an unusual character, it was shown that the husband had been guilty of at least two acts of physical violence, although they were separated from each other by a considerable period of time.

In the case at bar, the husband is charging the wife with extreme and repeated cruelty, and, in such case, "it is not sufficient to show slight acts of violence on her part toward him, so long as there is no reason to suppose he will not be able to protect himself by a proper exercise of his marital powers": *De La Hay v. De La Hay*, 21 Ill. 252.

We do not think that the court erred in refusing to instruct the jury that one act of force and violence, preceded by deliberate insult and abuse, even though committed wantonly and without provocation, was sufficient to constitute extreme and repeated cruelty.

Several other objections are made by the appellant based upon the giving or refusal of instructions. After a careful examination of all the instructions in connection with the evidence, we find no sufficient reason for disturbing the result reached by the lower courts.

The judgment of the appellate court is affirmed.

MARRIAGE AND DIVORCE. — DESERTION is the voluntary separation of one spouse from another without justification, and with no intention of returning: *Williams v. Williams*, 130 N. Y. 193; 27 Am. St. Rep. 517, and note; note to *McVickar v. McVickar*, 19 Am. St. Rep. 433. The reasonable cause which would justify a desertion of one spouse by another must be such as

would authorize a divorce *a mensa et thoro*: *Alkire v. Alkire*, 33 W. Va. 517; *Martin v. Martin*, 33 W. Va. 696; or such as would authorize a dissolution of the marriage bond: *Van Dyke v. Van Dyke*, 135 Pa. St. 459. See also *Ingersoll v. Ingersoll*, 49 Pa. St. 249; 88 Am. Dec. 500, and note.

MARRIAGE AND DIVORCE — REFUSAL OF SEXUAL INTERCOURSE — DESERTION. — Denial of sexual intercourse is not desertion: *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822; *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95, and note; *Segelbaum v. Segelbaum*, 39 Minn. 258.

MARRIAGE AND DIVORCE — EXTREME AND REPEATED CRUELTY. — A single act of cruelty on the part of the husband, although such act amounts to a technical assault, is not such cruelty as justifies a divorce at the suit of the wife: *Nye's Appeal*, 126 Pa. St. 341; 12 Am. St. Rep. 873, and note; *Hoshall v. Hoshall*, 51 Md. 72; 34 Am. Rep. 298. See extended note to *Morris v. Morris*, 73 Am. Dec. 619.

DICKISON v. DICKISON.

[138 ILLINOIS, 541.]

WILLS, HOW CONSTRUED — INTENTION. — The sole purpose of the construction of a will is to find and declare the intention of the testator, that effect may be given to such intention when not contrary to public policy or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible.

WILLS — SPECIFIC DEVISE CONSTRUED TO BE FULL MEASURE OF DEVISEE'S PORTION OF ESTATE, WHEN. — Where a testator specifically devises to two of his children, as tenants in common, a tract of land, "to be in full of their portion of my estate, both real and personal," and after making other devises to his other children directs his executor to sell the residue of his estate, real and personal, and, after paying his debts, to divide the remainder among his heirs, as follows: to his wife one third part thereof, "and the remainder to my children in equal portions, share and share alike," the land specifically devised to the two children first mentioned is the complete measure of what the devisees are to take or receive as their part, share, division, or portion of the testator's estate, and they take nothing under the residuary clause.

WILLS — RELATIVE ORDER OF DEVISES MAY BE REVERSED IN ORDER TO GIVE EFFECT TO EACH. — The rule which sacrifices the former clause in a will because inconsistent with a later one is never applied, except upon failure to give such construction as renders the whole will effective and allows each provision to stand. It is, therefore, permissible, in order to enable the court to uphold all the provisions of the will, to resort to every reasonable intendment, to reverse the relative order of the devises or bequests, and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each.

WILLS — REPUGNANT WORDS IN ANY PART OF WILL REJECTED OR TRANSPOSED, WHEN. — Repugnant words, in whatever portion of a will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed, or lim-

ited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested.

WILLS — GENERAL PROVISIONS OF WILL GIVE WAY TO SPECIFIC PROVISIONS.

General provisions in a will must give way to specific provisions, and where there is a general devise of property in one part of the will and a specific disposition of the same property in another part, these are to be regarded, generally, as excepted out of the general devise.

RESIDUARY CLAUSE IN WILL, HOW CONSTRUED. —

A general residuary clause in a will, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will generally be construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of, and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise.

McCulloch and McCulloch, for the appellant.

Arthur Keithley, for the appellee.

SHOPE, J. April 9, 1874, Griffith Dickison, then in life, made his last will and testament. At that time, it is conceded, for the purposes of this appeal, he had ten children. In and by clauses two to eight inclusive, and clause ten of the will, he made specific devises to his wife and eight of the children, severally. By clause nine he made a specific devise to his two other children, as follows: —

“9. To my children, John Abraham and Mary Ann, I will, devise, and bequeath the west half of the northwest quarter of section 27, in township 10 north, range 7 east, in equal shares, to be in full of their portions of my estate, both real and personal, to be theirs, their heirs, and assigns, forever.”

The eleventh clause of the will is as follows: —

“11. All the rest of the real estate of which I may die possessed shall be by my executor sold, also all the personal property I may have at my death shall be sold, and from the proceeds of such sales he shall first pay all my debts, etc., the remainder he shall divide amongst my heirs, as follows: To my wife, Sarah A. Dickison, one-third part thereof, and the remainder to my children in equal portions, share and share alike, to be theirs, their heirs and assigns, forever, absolute.”

On the seventh day of March, 1882, there was executed by the testator, in due form of law, and attached to the original will, the following codicil: —

“Whereas, I, Griffith Dickison, did on the ninth day of April, 1874, make my last will and testament, in and by which will I made devises to all my children then born; and whereas, since that date a son has been born to me, whom I have named Fred, I make this codicil to my said will, to have the same

force and effect as if it was a part of my original will, — that is to say, I will, devise, and bequeath to my son Fred (certain described realty) in fee, and to my daughter, Roxie J. Hitchcock (certain described realty) in fee.”

The testator died March 14, 1886, and shortly thereafter said will, with the codicil annexed, was duly admitted to probate. Subsequently the executor reported to the county court, that after payment of all claims, etc., he had in his hands \$9,214.05 for distribution under the residuary clause of the will, and asking an order of the court thereon.

The question presented by this record is, whether appellant, John A. Dickison, is entitled to participate in the distribution of that fund. That he was a child of the testator, and therefore fell within the designation of persons who were to take under the residuary clause of the will, is conceded. It must therefore be held that he is a distributee thereunder of the residuum in the hands of the executor, unless that clause is controlled by other portions of the will, so as to exclude him from participation, and this must depend upon the intention of the testator as expressed in his will. The sole purpose of construction of the instrument is to find and declare the intention of the testator, that effect may be given to such intention when not contrary to public policy or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible: 1 Redfield on Wills, 334 et seq.; *Caruthers v. McNeill*, 97 Ill. 256; *Kennedy v. Kennedy*, 105 Ill. 350; *Taubenhan v. Dunz*, 125 Ill. 529, and cases cited.

By the ninth clause of his will the testator devised to John A. (appellant) and Mary Ann, his son and daughter, as tenants in common, the tract of land therein described, “to be in full of their portion of my estate, both real and personal, to be theirs, their heirs and assigns, forever.” The language here employed is neither ambiguous nor unintelligible. If understood in their ordinary and popular significance, as they must be, except where technical terms are used, the words convey a definite and certain meaning. The word “portion,” in its commonly accepted meaning, is the equivalent of **part, share, or division**: Worcester’s Dictionary. To be in full of their part or share or division of an estate, means to be the

complete measure of such share, part, or division: Worcester. The evident intention of the testator was, that the land devised was to be the complete measure of what these devisees should take or receive as their part, share, division, or portion of his estate.

Nor is the construction less satisfactory if it be considered that the testator used the word "portion" in its technical, legal sense. Technically, a "portion" is defined to be "the part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child": Bouvier. The devise would therefore be in full, — i. e., the complete measure of, — the part of the testator's estate given or devised, or the provision made by the testator for these devisees.

The evident intention of the testator, as manifested by this clause of the will, was to limit the quantity of his estate to be taken or received by his son John A. and his daughter Mary A. to the specific devise of the land mentioned in clause nine. This intention is clearly and unambiguously expressed. The difficulty arises, however, not in respect of any uncertainty as to the intent expressed in this clause of the will, but because of the repugnancy existing between this and the eleventh or residuary clause. The latter clause provides, as we have seen, that all the rest and residue of the testator's real estate not specifically devised, and all his personal estate, shall be sold by his executor, and after paying debts, etc., the remainder be divided among his heirs as follows: to his wife one-third part thereof, "and the remainder to my children in equal portions, share and share alike, their heirs and assigns, forever, absolute." It will be observed that the testator here again uses the word "portion" as the equivalent of part or share.

It is apparent that if the appellant and his sister Mary A. are held to be included in this general residuary clause, the provision of clause nine, that the land therein devised shall be in full of all they shall receive from the estate of the testator, is rendered nugatory. There is, therefore, it is said, repugnance between these two clauses, and that in such case the later provision must control. The rule is well established in this state, as elsewhere, that when the clauses of a will are irreconcilable and the repugnance invincible, the later clause will generally prevail: *Brownfield v. Wilson*, 78 Ill. 470; *Murfitt v. Jessop*, 94 Ill. 158; 3 Jarman on Wills, 705; 1 Redfield on Wills, 443-445.

In matters of so great solemnity as making a testamentary

disposition of property it cannot be presumed that a testator would purposely make inconsistent provisions, incapable of being carried into effect. Unlike conveyance by deed, in which the first complete grant leaves nothing in the grantor to be subsequently conveyed, a will remains ambulatory, and the latest expressed intention is to be given operation; and as the testator might have changed his mind during the drafting of his will, there being no way of accounting for or removing the repugnancy, it will be presumed that he did, after writing the former clause, change his purpose, and that the subsequent clause gives expression to a later formed intention. The rule is adopted by the courts as an aid to finding the real intention of the testator as finally expressed in his will, and arises out of the very necessity of the case, and rests upon the single presumption of fact of change of intention while writing the will. The fundamental rule of construction being, as we have seen, that the intention is to be found from a consideration of the whole will, and such construction given as will uphold all of its provisions and give to each clause and part its just operation and effect, it follows that the presumption of the fact upon which the rule is predicated will never be indulged or the rule applied until it is found, by the application of all other rules of construction, that the difficulty is unsolved and the clauses remain invincibly repugnant: *Redfield on Wills*, 445-452, and cases cited; *Morrall v. Sutton*, 1 Phill. Ch. 532.

The tendency of modern American decisions at least is toward reconciling the apparent repugnancy, if possible, without adopting unreasonable or absurd constructions; so much so, that it is stated by the learned author just cited, "that it is now becoming very uncommon with us to hear a court declare a will, or any of its provisions, wholly inoperative by reason of repugnancy or uncertainty": *Redfield on Wills*, p. 453. The rule, therefore, which sacrifices the former clause because inconsistent with a later one is never applied, except upon failure to give such construction as renders the whole will effective and allows each provision to stand. Hence it has been held, that to enable the court to uphold all the provisions of the will, it is permissible to resort to every reasonable intentment,—to reverse the relative order of the devises or bequests, and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each: *Mutter's Appeal*, 38 Pa. St. 314; *Covenhoven v. Shuler*, 2 Paige, 122; 21 Am. Dec. 73; *Pruden v. Pruden*, 14 Ohio St.

251; *Langham v. Sanford*, 19 Ves. 641; *Brocklebank v. Johnson*, 20 Beav. 205; *Ridout v. Dowding*, 1 Atk. 419; *Hatfield v. Snider*, 42 Barb. 615; *Crissman v. Crissman*, 5 Ired. 498; and so repugnant words, in whatever portion of the will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed, or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested: *Holliday v. Dixon*, 27 Ill. 33; *Wattlington v. Waldron*, 4 De Gex, M. & G. 259; *Boon v. Cornforth*, 2 Ves. Sr. 277; *Jones v. Price*, 11 Sim. 557.

Further discussion of the general rule will be unnecessary, as we are not required to go to so great length in the construction of this will as many of the cases have gone. It is also a familiar rule in the construction of wills, that general provisions in a will must give way to specific provisions—that where there is a general devise of property in one part of the will and a specific disposition of the same property in another part, these are to be regarded generally as excepted out of the general devise: *Redfield on Wills*, 446, and cases cited. Moreover, a general residuary clause, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will generally be construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of, and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise: *Redfield on Wills*, 446, and cases cited. The specific directions in the will, where the mind of the testator has been directly and intelligently directed to them, are much safer guides to his intention than general provisions, which do, by virtue of their generality, contravene the specific provision, but which might or might not have been so intended; and especially is this so where, as in this case, the general provision is a residuary clause, which, as we have said, might, as it generally is, have been inserted with the sole view of the disposition of any residuum of the estate not before devised. Here the testator made specific devises to all his children, of land, and accompanied the devise to appellant, and his sister Mary Ann, with the express provision that the land devised was to be in full of their portion of his estate, both real and personal. Nothing can be clearer than the intention thus expressed that neither appellant nor Mary A. should participate in the estate of the testator further than the specific devise

made to them. It was to be, as we have seen, the complete measure of all they should take out of the estate of the testator, "both real and personal," and excluding them from further participation. Following this clause comes a specific devise of other lands, without limitation, to another son, Griffith A., and then follows the general clause before quoted. By that clause the residue of the testator's property, real and personal, is to be sold, and after the payment of debts, to be divided, one third to the testator's widow, Sarah A. Dickison, and the remainder to his children, share and share alike. It is apparent that in making this clause the testator intended especially to provide for his wife, giving her one third of the residue, which she could not otherwise, as his widow, have taken without renouncing the previous specific provision for her benefit. The care taken in naming her evinces the solicitude of the testator in her behalf, undoubtedly arising from the fact, as shown by the record, that no formal marriage had been solemnized between them, and at most a common-law marriage only existed, which might be contested. Beyond the naming of his then wife, no one else is named — the residue is to be divided among his children without further designation. There are no other words indicating an intention to abrogate or destroy the limitation coupled with the devise to appellant.

It is much more probable that the testator introduced the residuary clause primarily to protect his widow, and secondly, to give effect to the limitation coupled with the devise in the ninth clause of the will, by preventing any portion of his estate from becoming intestate estate, and distributable to his heirs, including appellant, than that he had changed his purpose after the writing of the second preceding clause. Especially is this so when we consider that all that portion of clause nine repugnant to the residuary disposition could have been erased or expunged without in the least affecting the specific devise made. The intention of the testator must control when it can be ascertained, and we are of the opinion that it is clearly manifest that the testator intended to exclude appellant from participation in his estate beyond the specific devise made to him. The will, taken and considered as a whole, leaves no serious doubt of that intention. The testator had just previously excluded appellant from participation in any residue of his estate then existing or thereafter to be

acquired, and undoubtedly, having in mind this provision, made the general provision subject to it.

Nor is this rendered less certain by the codicil made by the testator. It is true that he therein says that he had, in and by his will, "made devises to all my children then born"; but the purpose of the codicil, and to what devises the testator referred, is clearly apparent. Thereby he makes a specific devise to a son born subsequently to the making of the original will, and of the same kind as those specifically made to his other children. Indeed, he takes, by the codicil, the land specifically devised to his daughter Roxie by the will, and gives it to the after-born son, and in lieu thereof specifically devised another tract of land to the daughter. He had, as is said in the codicil, by his will made devises to all of his children. He had specifically devised to each a tract or tracts of land, as he was then doing for his younger son, born after the making of the will, and to such specific devises alone the language of the codicil may be referred. It was these he manifestly had in mind, and to which his attention was attracted in making like provision for his other and after-born child.

We are of opinion that the provisions of this will clearly evince an intention to exclude appellant from participation in any residue of his estate, and that the appellate court held correctly in excluding him from participating therein.

The judgment of the appellate court affirming the decree of the circuit court is affirmed.

In the case of *Rickner v. Kessler*, 133 Ill. 636, it was held that the intention of a testator must be determined from the language of the whole will, and that no construction should be adopted which does violence to the language of any provision, so long as the different provisions can be harmonized and construed together. In that case the testator in his will showed an intention to give his widow a life estate in all his real estate, and it was held by the court that such intention was not defeated by a devise of certain lots in the next succeeding clause to a son or daughter in fee simple, but that the widow took a life estate in such lots, and the son or daughter the remainder.

WILLS — CONSTRUCTION — TESTATOR'S INTENT. — In construing a will the first and great object is to ascertain the intention of the testator from the instrument itself and carry that intent into effect when it does not conflict with the law: *Cresap v. Cresap*, 34 W. Va. 310; *L'Etorneau v. Henquenot*, 89 Mich. 428; 28 Am. St. Rep. 310; *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743, and note; *Gobel v. Wolf*, 113 N. Y. 405; 10 Am. St. Rep. 464, and note; *Jaudon v. Ducker*, 27 S. C. 295; *McGee v. Hall*, 26 S. C. 179; *Boardman, Petitioner*, 16 R. I. 131; *Wales v. Templeton*, 83 Mich. 177; *Lake v. Copeland*, 82 Tex. 464; *In re Rogers*, 94 Cal. 526; **New Orleans v. Hardie*, 43 La. Ann. 251; *Succession of Blukeman*, 43 La. Ann. 846. See also note to *Elliott v. Elliott*, 10 Am. St. Rep. 59.

WILLS — REPUGNANT CLAUSES — REJECTION OF: See note to *Estate of Hunt*, 19 Am. St. Rep. 644, 645. In construing a will the testator's particular intent, shown by a single provision standing by itself, must yield to the general leading intent as manifested by the whole instrument: *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92, and note. Rejecting words inconsistent with the other parts of the will, see note to *Goode v. Goode*, 66 Am. Dec. 635.

WILLS — RESIDUARY CLAUSE — CONSTRUCTION OF: See note to *Jones v. Bacon*, 28 Am. Rep. 4, also *Lamb v. Lamb*, 131 N. Y. 227.

AMERICAN EXCHANGE NATIONAL BANK v. GREGG.

[138 ILLINOIS, 596.]

BANKING — CHECK, WHAT AMOUNTS TO PAYMENT OF. — Where a bank receives a check drawn on it, stamps it as paid, and enters the amount thereof to the credit of the holder presenting it, this amounts to a payment of the check, although the bank may fail to charge the account of the drawer on its books with the amount; and after such payment the bank has no right to charge back the amount of the check to the account of the depositor without his consent.

BANKING — ACCEPTANCE OF CHECK MAKES BANK DEBTOR OF DEPOSITOR, WHEN. — When a check is offered as a deposit to the bank on which it is drawn, and is received as such, the check being genuine, in the absence of fraud, the bank becomes the debtor of the depositor, the title to the deposit passes to the bank, and the transaction is conclusive and executed between the parties, and this whether the books of the bank are correctly kept or not.

BANK — BANK'S OBLIGATION TO PAY CHECK DEPENDS ON ACTUAL STATE OF DRAWER'S ACCOUNT. — The obligation of a bank to pay a check drawn upon it, or its right to refuse payment thereof, depends upon the actual state of the drawer's bank account at the time of its presentment, and not upon what the bank books may then show.

Swift, Campbell and Jones, for the appellant.

Bisbee and Reed, for the appellees.

CRAIG, J. This was an action of assumpsit, brought by appellees, Gregg, Son & Co., on a check for seven thousand dollars, which was dated June 15, 1887, drawn on the American Exchange National Bank of Chicago, by C. J. Kershaw & Co., payable to the order of Gregg, Son & Co. The declaration contained a special count on the check, in which it was averred that the bank refused to pay the check, although it had money on deposit to the credit of C. J. Kershaw & Co. when payment was demanded. The declaration also contained the common money counts and a count on an account stated.

It appears from the record that the check was received by Gregg, Son & Co. on the morning of June 15, 1887, and at eleven o'clock of that morning it was presented to the bank,

with a request that the bank certify the check. This being refused, about ten minutes later the check was again presented, and a demand again made for certification or payment, which was also refused. At the close of business in the afternoon of June 14th, the books of the bank showed a credit balance to the account of C. J. Kershaw & Co. of \$11,401.17, and on the morning of June 15th Kershaw & Co. deposited to their credit \$399,200. There were therefore sufficient funds in the bank to the credit of Kershaw & Co., as appeared from the books of the bank, to pay the check when payment was demanded, unless the bank had the right to deduct from the account of Kershaw & Co. a certain check for \$256,800, which had been drawn on the bank by Kershaw & Co., in favor of D. Eggleston and Son, on June 13th, two days before. This check, on the afternoon of June 13th, was taken to the bank by D. Eggleston and Son, properly indorsed by them. The bank accepted the check, stamped it, paid it, and placed the amount thereof to the credit of D. Eggleston and Son. But the bank did not then charge the check to the account of Kershaw & Co. If the bank had charged the check to the account of Kershaw & Co., their account would have been largely overdrawn. It also appears that on the afternoon of June 14th the bank charged back the check for \$256,800 to the account of D. Eggleston and Son, but the evidence fails to show any authority for this action from D. Eggleston and Son.

The attorneys for appellant have argued at some length, in their brief and argument filed in this court, the questions of fact; but as we do not review controverted questions of fact, it will serve no useful purpose to allude to that branch of the argument further than may be necessary to pass upon the ruling of the court on the instructions to the jury.

Several grounds have been urged for a reversal of the judgment, but in the view we take of the record but one question need be considered.

On the trial appellant requested the court to give the following instruction, which the court refused, and an exception was taken:—

“On behalf of the defendant the court instructs the jury, that if the jury finds from the evidence that D. Eggleston and Son kept a bank account with defendant, and that the check of Kershaw & Co. to D. Eggleston and Son for \$256,878.18 was credited by defendant to the account of D. Eggleston and Son on June 13, 1887, such crediting of the check to the ac-

count of Eggleston and Son amounted, in law, to a payment of the check by defendant, and defendant had the right to charge said check to the account of Kershaw & Co. before paying the check in this suit; and if the jury find, from the evidence, that defendant charged back the check for \$256,878.18 to the account of D. Eggleston and Son on June 14th, still the right of defendant to charge to the account of Kershaw & Co. the check for \$256,878.18 before paying the check in suit would not be changed, unless the jury further find, from the evidence, that D. Eggleston and Son consented to the charging back of the check to their account on June 14th. The mere fact that the check for \$256,878.18 was not charged to Kershaw & Co. on the books of defendant till after the check in suit was presented, if the jury find such to be the fact, will not entitle plaintiffs to recover, unless the jury find, from the evidence, that after charging to Kershaw & Co. the check for \$256,878.18 there was sufficient money to the credit of Kershaw & Co. to pay the check in suit."

As has been seen, the check Kershaw & Co. gave to D. Eggleston and Son was presented to the bank for payment, properly indorsed by the payees. The bank received the check, stamped it, paid it, and placed the amount thereof to the credit of D. Eggleston and Son upon the books of the bank. This must be regarded as a payment of the check. The transaction was as complete a payment as if the bank, when the check was presented, had paid in money the amount thereof into the hands of D. Eggleston and Son, and they, in turn, had deposited the money in the bank to their credit. When the check was presented and accepted by the bank and canceled, and deposited to the credit of D. Eggleston and Son, as between the depositors and the bank, the transaction was closed, and the bank had no authority afterward, without the consent of D. Eggleston and Son, to charge the check back to their account. That act, without such consent, was a nullity.

In *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, the court, in discussing a transaction of this character, says: "Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiffs with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass-book of the plaintiffs and entered upon the books of the bank. Financial business is transacted at banks in large amounts with great

rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business. In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but if it accepts such a check, and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine."

In *Morse on Banking*, page 321, it is said: "But if, at the time the holder hands in the check, he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable."

In *National Bank v. Burkhardt*, 100 U. S. 686, the quotation from *Morse* and the case of *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, are quoted with approval, and the doctrine therein announced fully sanctioned. Where a check is offered as a deposit, and received as such, the check being genuine, in the absence of fraud the bank becomes the debtor of the depositor, and the title of the deposit passes to the bank; and no reason is perceived why the transaction should not be conclusive and an executed one between the two parties. Indeed, any other rule would embarrass the transaction of business between banks and their depositors.

From what has been said, if we are correct, it follows that the court erred in refusing the instruction.

Something has been said in regard to the fact that the check given to D. Eggleston and Son had not been actually charged to Kershaw & Co. on the books of the bank until after the check involved was presented and payment demanded. We do not regard this as a controlling element in the case. This was a matter of book-keeping, and the rights of the parties are not to be determined merely from the manner in which books are kept. When the check in question was presented, the question was, whether Kershaw & Co. at the time had funds in the bank sufficient to pay it. If they had, the bank was bound to pay the check; otherwise, not. In determining this question the bank had the right to take into consideration a check drawn by Kershaw & Co., which had in good faith been previously paid, although such check remained on a spindle in the bank and had not been entered up by the book-keeper. In other words, when a check is presented to a bank for payment, the bank will take into consideration all the funds which it has received from the drawer subject to check to that time, and the total amount of all sums up to that time which it has paid out on his account. A balance thus ascertained will determine the obligation of the bank to pay or its right to refuse payment, regardless of the fact whether the amounts deposited or the checks paid may have reached the bank ledger or not.

For the errors indicated, the judgments of the appellate and circuit courts will be reversed, and the cause will be remanded to the circuit court.

BANKING — CHECKS — DEPOSIT. — Where a bank receives from the payee a genuine check drawn upon itself by a customer, as a deposit, it becomes at once the debtor of the depositor for the amount: *Oddie v. National Bank*, 45 N. Y. 735; 6 Am. Rep. 160. The contrary doctrine is held in *National etc. Trust Co. v. McDonald*, 51 Cal. 64; 21 Am. Rep. 697. So a check as a deposit does not establish the relation of debtor by the bank to the depositor: *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40; *Rapp v. National Bank*, 136 Pa. St. 426. Checks or other evidences of debt accepted by a bank in good faith as deposits, and credited as so much money, transfer their title to the bank, and it becomes legally liable to the depositor as for so much money: *Wasson v. Lamb*, 120 Ind. 514; 16 Am. St. Rep. 342, and note; and so a bank that has received money from a customer and credited it to him on its books cannot be afterward heard to say that it belongs to some one else: *First Nat. Bank v. Mason*, 95 Pa. St. 113; 40 Am. Rep. 632. See also *Bailey v. Pardridge*, 134 Ill. 188.

BANKS — LIABILITY TO PAY CHECKS DRAWN BY DEPOSITORS: See *Lynch v. First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803, and note.

OHIO AND MISSISSIPPI RAILWAY Co. v. RAMEY.

[139 ILLINOIS, 9.]

RAILWAYS — FLOODS. — A railroad company, in constructing and maintaining embankments bordering upon a watercourse, is bound not only to anticipate and provide for the flow of the natural rise and fall of the waters during the year, but also for the floods and freshets which occur at longer periods or intervals, and which, from having been known to occur, may reasonably be expected again.

RAILWAYS — FLOODS — DUTY TO PROVIDE AGAINST. — Although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it.

RAILWAYS — FLOODS — LIABILITY FOR INJURIES RESULTING FROM. — In an action against a railroad company to recover damages for the obstruction of the flow of water in a stream by an embankment and thereby overflowing adjoining lands, the company is liable if it has not provided for the escape of the water of such unusual or extraordinary floods, as it should reasonably have anticipated would occasionally occur in the future, because they had occasionally occurred at intervals, though of irregular duration, in the past

Pollard and Werner, for the appellant.

James M. Hay, for the appellee.

SCHOLFIELD, J. This is an action for negligence in constructing and maintaining an embankment for a railroad track over the bottom lands bordering a watercourse, whereby water that would otherwise have flowed away was backed and thrown upon lands possessed by the plaintiff, and his crops growing thereon were damaged. The defendant pleaded not guilty, and upon the trial endeavored to prove that the backing of the water upon the lands possessed by the plaintiff and doing the injury complained of was caused by an extraordinary rainfall.

At the request of the defendant the court submitted the following interrogatory to the jury, namely: "Was the plaintiff's damage which is complained of, the direct result of an extraordinary rainfall on June 16, 1888?" The jury returned a verdict in favor of the plaintiff, but neglected to return any answer to the interrogatory. The defendant then moved the court to require the jury to again retire to their room and agree upon an answer to the interrogatory, and return it into court with their verdict; but the court overruled the motion and gave judgment upon the verdict, and this ruling presents the only question for our determination upon this record.

We think the question, as submitted, was immaterial. Language may, indeed, be found seeming to hold otherwise in *McCoy v. Danley*, 20 Pa. St. 89; 57 Am. Dec. 680, and *Pittsburg etc. R'y Co. v. Gilleland*, 56 Pa. St. 445; 94 Am. Dec. 97; but we think the rule is more accurately stated in *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61, and *Mayor of New York v. Bailey*, 2 Denio, 433. In the former case, which was an action for injuries to plaintiff's coal yard by maintaining a mill-dam in an unsafe condition, it was, among other things, said: "And it is not enough that the dam is sufficient to resist ordinary floods, for if the stream is occasionally subject to great freshets, those must likewise be guarded against, and the measure of care required in such cases must be that which a discreet person would use if the whole were his own. In *Mayor of New York v. Bailey*, 2 Denio, 433, it was held that the dam should be sufficient to resist not merely ordinary freshets, but such extraordinary floods as may be reasonably anticipated." So in *Nichols v. Morsland*, 2 L. R., Ex. D. 1, where the action was for permitting water to escape from artificial lakes upon the defendant's land, and to thereby destroy certain bridges, and the defense was that the injury was caused by the act of God, it was said: "However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate." This is quoted with approval in *Nitro-Phosphate etc. Co. v. London etc. Docks Co.*, 9 L. R., Ch. Div. 516, and it is observed in the latter case, that "to say that a thing could not reasonably have been anticipated, is to say that it is the act of God."

The principle clearly is, that although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this state, that our streams are occasionally subject, after intervals which are sometimes of shorter and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them.

Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary, — i. e., they were extraordinary; and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they are produced, and the same conditions to be affected by those laws, will continue to exist in the future as they have in the past. Though of rare occurrence, such rainfalls are not phenomenal, and therefore beyond reasonable anticipation, and it is hence but the prudence that a discreet man would exercise in his own affairs to provide against injury from them. The question, then, is not whether appellant has sufficiently provided for the escape of the water of ordinary floods, but has it provided for the escape of the water of such unusual or extraordinary floods as it should have anticipated would occasionally occur in the future, because they had occasionally occurred after intervals, though of irregular duration, in the past. The question, as submitted, omitted the very material qualification that the rainfall was so great or extraordinary that it could not have been reasonably anticipated, and without this it was inconsequential.

The judgment is affirmed. —

RAILROADS — FLOODS — DUTY TO PROVIDE AGAINST. — If during freshets water is collected in large quantities and forced in a well-defined channel, a railroad company maintaining an embankment there must provide a suitable outlet to it: *Rowe v. St. Paul etc. R'y Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and note. A railroad on the bank of a river which erects an embankment which increases the overflow in times of flood upon the lands of an opposite proprietor to his injury, is liable in damages therefor: *O'Connell v. East Tennessee etc. R'y Co.*, 87 Ga. 246; 27 Am. St. Rep. 246, and note; *Railway Co. v. Mossman*, 90 Tenn. 157; 25 Am. St. Rep. 670, and note with cases collected. A railroad must construct its culverts so as to carry off all the water under all ordinary circumstances likely to accrue in the usual course of nature, even to the extent of such heavy rains as may ordinarily be expected, being of occasional occurrence, but is not bound to provide for overflows, the result of extraordinary and unusual rainfalls: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727, and note; *Philadelphia etc. R. R. Co. v. Davis*, 68 Md. 281; 6 Am. St. Rep. 440, and note.

LIGARE v. CITY OF CHICAGO.

[139 ILLINOIS, 46.]

MUNICIPAL CORPORATIONS — ORDINANCES. — WHEN TWO ORDINANCES for the widening of a street are passed on the same day and the last one expressly refers to and is by its terms dependent upon the adoption and enforcement of the first, and requires that the entire expense of enforcing both, and all damages which may be adjudged against the city, shall be paid by certain railroad companies in whose interest the ordinances are passed, they will be treated as a single and entire scheme.

STREETS — RIGHT OF MUNICIPALITY TO GRANT EXCLUSIVE USE OF. — Under legislative authority authorizing railroad tracks to be laid in streets, a municipality has no power to grant the exclusive use of a street to a railroad company.

STREETS — RIGHT OF MUNICIPALITY TO GRANT USE OF TO RAILWAYS. — A municipality may authorize the laying of railroad tracts in its streets, but in thus permitting them to be used the city has no right to so obstruct the streets as to deprive the public and adjacent property-holders of their use as streets. The primary object of a street is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use.

STREETS — USES — ASSESSMENTS FOR WHAT PURPOSES LAWFUL. — Municipalities are empowered to lay out, open, and improve streets only for such a public use that persons and property within the municipality might be legitimately assessed or taxed to pay therefor. Persons and property cannot be legitimately taxed for the right of way, or the making and improving of a road for a railroad company alone. A street which has been improved and maintained by a city cannot by it be granted to an exclusive use for which it has no authority to lay out, open, or improve it.

EMINENT DOMAIN. — STATUTES CONFERRING POWER to exercise the right of eminent domain are to be construed strictly, and unless both the letter and the spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised.

EMINENT DOMAIN. — IN CONSTRUING STATUTES CONFERRING POWER to exercise the right of eminent domain, the question is not as to whether or not the person or corporation seeking to exercise it might not do so with as great safety to persons and property as any other person or corporation, or whether it would work out an equitable result to allow a particular person or corporation to exercise it in a given case. The question is purely one of legal power. That person or corporation which the statute says may exercise it for a stated purpose, may exercise it for that purpose, but for no other, and no other person or corporation not thus authorized can exercise it for that purpose.

STREETS — MUNICIPAL CONTROL OVER. — A city cannot, under authority to condemn property for streets, condemn it for a railroad track exclusively. The city cannot do indirectly by mere change in form, that which it cannot do directly. Hence it cannot condemn property for streets and afterward by a grant of power allow railroad tracks to be laid upon it, to the extent of excluding all other uses.

WATERWAYS — MUNICIPAL CONTROL OVER. — When a franchise is granted by a city to construct ways or streets across a navigable waterway, there is no implied right to destroy the waterway. It must be so

bridged that its use will not be unnecessarily impaired. The right of navigation and the right of crossing the waterway are equal.

WATERWAYS — MUNICIPAL CONTROL OVER. — A city, under its power to lay out, open, and improve streets, has no implied power to authorize the taking or destruction of a navigable watercourse. To authorize such taking or destruction, express power in the city to grant the right must be shown.

PETITION of the city of Chicago to widen a street therein, known as Archer Avenue, and for this purpose to condemn certain parcels of land adjacent thereto. This proceeding was based upon two ordinances, passed by the city authorities on the same day, viz., August 1, 1889, the first of which was as follows:—

“ORDINANCE FOR THE WIDENING OF ARCHER AVENUE.

“Be it ordained by the council of the city of Chicago:—

“Section 1. That the portion of Archer Avenue lying between a point on the south line of said avenue, one hundred (100) feet east of the east line of Bushnell Street and the easterly line of Sanger Street, be and the same is hereby ordered widened as follows, viz.: By taking or appropriating therefor the land on the south side of said avenue lying north of the following described line: Beginning at the said point on the south line of Archer Avenue about one hundred (100) feet east of the east line of Bushnell Street, and running thence southwesterly on a curve to the right to the southwest corner of lot two (2), block nine (9), South Branch Addition; thence west on a straight line to a point on the west line of Wallace Street, situated one hundred (100) feet south of the south line of Archer Avenue; thence westerly on a curve to the right to a point on the east line of lot ten (10), in block eleven (11), in South Branch Addition to Chicago, situated about fifty (50) feet south of the south line of Archer Avenue; thence southerly along the southeasterly line of said lot ten (10) to the northerly line of McGregor Street; thence westerly along the northerly line of McGregor Street to its intersection with Archer Avenue.

“Sec. 2. Any legal proceedings necessary to accomplish the widening of Archer Avenue, as aforesaid, are hereby authorized, and the counsel to the corporation is hereby directed to file a petition in a court of competent jurisdiction in Cook County, Illinois, in the name of the city of Chicago, praying that ‘the just compensation to be made for private property to be taken or damaged for said improvements or purpose specified in this ordinance shall be ascertained by a jury,’

and to file a supplemental petition, in accordance with the provisions of section 53 of article 9 of an act of the general assembly of the state of Illinois entitled 'An act to provide for the incorporation of cities and villages.'

"Sec. 3. The improvement hereby ordered shall be made, and the cost thereof paid for, by a special assessment to be levied upon the property benefited thereby, to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation, in accordance with article 9 aforesaid.

"Sec. 4. This ordinance shall be in force from and after its passage."

The following are the material parts of the second ordinance relating to the same matter.

"Sec. 5. Whereas, an ordinance has been introduced and is now pending in the city council for the widening of Archer Avenue, between Bushnell Street and Sanger Street, by appropriating therefor the land on the south side of said avenue lying north of the following described line, to wit: beginning at a point on the south line of Archer Avenue, about one hundred (100) feet east of the east line of Bushnell Street, and running thence southwesterly on a curve to the right to the southwest corner of lot two (2), block nine (9), South Branch Addition; thence west on a straight line to a point on the west line of Wallace Street situated one hundred (100) feet south of the south line of Archer Avenue; thence westerly on a curve to the right to a point on the east line of lot ten (10), block eleven (11), in South Branch Addition to Chicago, situated about fifty (50) feet south of the south line of Archer Avenue; thence southerly along the southeasterly line of said lot ten (10) to the northerly line of McGregor Street; thence westerly along the northerly line of McGregor Street to its intersection with Archer Avenue. Now, in case said ordinance shall go into effect and said avenue is widened, permission and authority are hereby granted to the Chicago, Madison, and Northern Railroad Company, its lessees, successors, and assigns, to lay down, maintain, and operate four railroad tracks, and to the Chicago and Alton Railroad Company, its lessees, successors, and assigns, to lay down, maintain, and operate two railroad tracks on that portion of Archer Avenue, when widened as aforesaid, lying between the two following lines, to wit: one line north of and nearly parallel to and seventy (70) feet distant from the south line of widened Archer Avenue, as said

line is above described, the other line north of and nearly parallel to the said described line, and one hundred and sixty (160) feet distant therefrom. The permission and authority granted in this section are upon the condition, however, that no steam railroad track shall be laid down or maintained on said Archer Avenue between Bushnell Street and Sanger Street, except between the two lines last above described, and upon the further condition that the cost and expense of procuring the land necessary for the widening of Archer Avenue as aforesaid, and all damages occasioned thereby, and the cost of grading and paving the same, and also so much of the said street adjoining it on the north as shall be occupied by the tracks of the Chicago, Madison, and Northern Railroad Company and the tracks of the Chicago and Alton Railroad Company, shall be paid for by the Chicago, Madison, and Northern Railroad Company, and a special assessment for the aforesaid cost and expense may be levied solely on the property of said railroad company; and the said Chicago, Madison, and Northern Railroad Company shall build, at its own expense, in conformity to plans to be approved by the commissioner of public works, along the south side of its roadway, the entire length of Archer Avenue which it shall traverse, a substantial brick or stone wall twelve (12) feet in height, with stone coping, which said company shall keep in good condition and repair, and shall also construct a sidewalk along the south side of said wall whenever the same shall be ordered by the municipal authorities of said city.

"Sec. 6. The rights and privileges hereby granted to the several railroad companies herein named in Archer Avenue are subject to the rights and privileges therein of the Chicago City Railroad Company, and permission and authority are hereby granted, upon the completion of the widening of Archer Avenue, as aforesaid, to the said Chicago City Railroad Company, if it elects so to do, to remove their tracks from their present location in that portion of Archer Avenue so to be widened, and to relay them upon the south seventy (70) feet of Archer Avenue as widened. *Provided, however,* that said removal shall not be made until a permit therefor shall be obtained and the proposed location of said tracks on said seventy (70) feet has been approved by the commissioner of public works, and said tracks shall be relaid, subject to the approval of the said commissioner. Such removal shall be a waiver and abandonment of the rights of said Chicago City

Railway Company as to the portion of Archer Avenue from which said tracks are removed.

"Sec. 7. All that portion of Ogden Slip lying south of the north line of Archer Avenue, as the same shall be widened as recited in section 5, shall be permanently filled with earth, and the cost of the said improvement shall be paid by the Chicago, Madison and Northern Railroad Company. *Provided*, that the order of the city council, passed September 17, 1888, be and the same is hereby repealed, and the right of the Consumers' Gas Company to operate and maintain the switch tracks on the south side of Archer Avenue across Butler Street, also across Twenty-fourth Place, and the alley between Twenty-fourth Place and Twenty-fifth Street, is hereby confirmed. *Provided*, that the said Consumers' Gas Company shall consent to the closing and filling of said Ogden Slip, and release all claim to damages on account thereof. *Provided further*, that said Chicago, Madison, and Northern Railroad Company shall pay the city of Chicago for any sewers, drains, or pipes it may at any time place and construct on said premises now known as Ogden Slip, and all the cost and expense of laying the same.

"Sec. 8. Permission and authority are hereby granted to the Chicago and Alton Railroad Company, its successors and assigns, to lay down, maintain, and operate two main railroad tracks, with necessary switches, on ground to be acquired for the purpose, lying north of and adjacent or near to that portion of the said Chicago, Madison, and Northern Railroad, as herein located, which lies between the intersection of Grove Street with Archer Avenue and a point on Stewart Avenue between Grove Street and the south branch of the Chicago River, at which last-named point the said two main tracks may be connected with tracks of the said Chicago and Alton Railroad Company, now laid in Stewart Avenue, and to cross for that purpose all intervening streets and alleys.

"Sec. 9. Permission and authority are also hereby granted to the Chicago and Alton Railroad Company, its successors and assigns, to relocate its tracks between the east side of Joseph Street and the east side of Waver Street, and to lay down, maintain, and use between the street lines last mentioned, on grounds now owned by it and on grounds to be hereafter acquired for that purpose, lying north of and adjacent to the Chicago, Madison, and Northern railroad, as herein located, four main tracks, with necessary side-tracks, turnouts, and

switches, and to cross for the purpose all intervening streets and alleys. *Provided*, that no track shall be laid across either of such streets or alleys north of the present location of the northerly track of the said Chicago and Alton Railroad Company now laid over and across the same. When the tracks authorized in sections 8 and 9 of this ordinance cross any street or alley, said Chicago and Alton Railroad Company shall keep the space between the tracks planked or paved, and when said tracks cross any sidewalk the said company shall keep the sidewalk in the spaces between the tracks in good repair. All the provisions of this ordinance limiting the rights and fixing the obligations of the Chicago, Madison, and Northern Railroad shall be equally applicable to the Chicago and Alton Railroad, except those provisions relating to building the viaduct and approaches, the wall in Archer Avenue, constructing telegraph communication, and filling the Ogden slip.

“Sec. 10. The rights herein granted are upon the express condition that the said Chicago, Madison, and Northern Railroad Company shall pay to the city of Chicago the entire cost and expense of a viaduct over Halsted Street and approaches thereto, said viaduct and approaches to be the width of the streets, to be constructed in accordance with plans to be approved by the mayor and commissioner of public works. The north approach of said viaduct shall begin in Halsted Street, at or near the south branch of Chicago River, and on the south side thereof, and said approach and viaduct shall be constructed south along Halsted Street to Archer Avenue, and beyond, with approaches in Archer Avenue, making as little interference with the present grade of Archer Avenue in crossing as shall be found practicable. It is ordered that said viaduct shall be commenced within two years after the acceptance of this ordinance, and any legal proceedings necessary, by way of condemnation or otherwise, are hereby ordered to be taken. The said company shall and hereby agrees to pay all costs and expenses of such proceedings. The said Chicago, Madison, and Northern Railroad Company shall and hereby further agrees to pay to the city of Chicago the cost and expense of the construction and maintenance of a viaduct and approaches on Halsted Street and Archer Avenue, as aforesaid, in accordance with plans to be approved by the mayor and commissioner of public works, and the said company shall pay all damages to lots, lands, and buildings, and

any title to or interest therein, or to the occupancy or possession thereof, which may be recovered or obtained against the city of Chicago in consequence of the construction of said viaduct and approaches, and shall also pay all damages that shall accrue to property owners fronting on streets whereon such viaduct or approaches may be erected by reason of the construction of said viaduct and approaches. *Provided, however*, that the south approaches on Archer Avenue and Halsted Street shall be constructed so that the grade of said approaches, from the commencement thereof to the highest point of said approaches in Archer Avenue, shall be one foot of rise in each forty lineal feet, and from the north line of Archer Avenue to the south end of said viaduct the rise per foot shall be one foot in every thirty-two lineal feet.

"Sec. 11. Before exercising any of the rights hereby granted, the Chicago, Madison, and Northern Railroad Company shall execute to the city of Chicago a bond, in the penal sum of one hundred thousand dollars (\$100,000), to be approved by the mayor and comptroller, conditioned that said company shall and will observe and perform all the provisions of this ordinance, and shall and will forever indemnify and save harmless said city of Chicago against and from any and all damages, judgments, decrees, costs, and expenses of the same which said city may suffer, or which may be recovered or obtained against said city for or by reason of, or growing out of or resulting from, the passage of this ordinance, or from any act or acts of the said company under or by virtue of the privileges of this ordinance. *Provided, however*, that the said bond shall not be construed to limit the liability of said company to one hundred thousand dollars (\$100,000), but the said company shall be liable to the full extent of every liability imposed by this section, notwithstanding the amount thereof may exceed one hundred thousand dollars (\$100,000). *And it is hereby further provided*, that upon the recovery of any final judgment or judgments against the said city, as aforesaid, the said company shall immediately, and without prior payment of such judgment or judgments by said city, be liable to pay, and shall pay, the amount or amounts thereof to the said city, and the fact that the said city may not have paid such judgment or judgments shall constitute no defense on the part of said company."

It was also shown that in widening Archer Avenue it would

be necessary to fill in and shut up a navigable waterway known as Ogden Slip in the city of Chicago.

Ligare, one of the property owners affected by the petition to widen Archer Avenue under said ordinances filed a cross-petition, resisting the right of the city thus to condemn his property. The city recovered judgment as prayed for in its petition, and the court adopted the verdict of the jury fixing the compensation and damages for the property condemned and taken.

Plaintiff in error appealed.

C. C. Bonney and R. S. Thompson, for the appellant.

Elbert H. Gary, for the appellee.

SCHOLFIELD, J. It is to our minds clear that both ordinances before us in this case are but parts of a single and entire scheme. They were adopted on the same day, and the latter expressly refers to, and is by its terms dependent upon, the adoption and enforcement of the former, and it requires that the entire cost and expense of enforcing both ordinances, and all damages which may be adjudged against the city by reason of their being adopted and enforced, shall be paid by the railroad companies. Moreover, the attempt to widen Archer Avenue for the limited distance and in the peculiar manner described in the first ordinance is manifestly to meet a local want in that respect, and the second ordinance conclusively shows that that local want is space for laying down additional railroad tracks, and nothing else. It is also of some significance, as confirmatory of this view, that the petition for condemnation alleges that the first ordinance contemplates the closing and filling up of Ogden Slip, and that can only be upon the assumption that the second ordinance is supplemental to the first, for Ogden Slip is not mentioned or referred to, directly or indirectly, in the first ordinance. The case must then be treated precisely the same as if both ordinances had been embodied in one, and we shall therefore treat them as a single ordinance for widening a street in the manner proposed, and at the same time giving the use of all the old street at the place where the street is widened, and a part of the new street added by the widening, exclusively to certain railroad companies for laying and operating their tracks, and also for closing and filling up a public waterway.

Archer Avenue is sixty feet wide. One steam railroad track

is now laid on it and operated by the Chicago and Alton Railroad Company. The ordinance adds, at the point under consideration, one hundred feet to the street, and takes thirty feet of that and adds it to the sixty feet, making ninety feet, and upon this authorizes the Chicago and Alton Railroad Company to lay and operate two additional tracks, and the Chicago, Madison, and Northern Railroad Company to lay and operate four tracks, — making in all seven tracks to be laid and operated by steam engines within this ninety feet, or one track for every twelve and six-sevenths feet, and then requires that the part thus to be used shall be cut off from the remaining seventy feet of the street to be added, by a stone or brick wall twelve feet in height. The space to be occupied by the railroad tracks has also a line for street cars operated within it, but permission is given to remove that to the seventy feet south of the wall.

We shall take no time to demonstrate that the sixty feet of old street and the thirty feet of new street thus to be occupied by seven steam railroad tracks are exclusively devoted by the ordinance to the use of railroad companies. Hemmed in by the wall on the one side and by the buildings or inclosures on private property on the other, no rational being would, at the risk of the inevitable dangers from passing engines and cars, use this part of the street as a common highway, unless under stress of most extraordinary circumstances. It is not material that the public are not, by the words of the ordinance, forbidden the use of this part of the street, — the effect of the grant is inevitably an exclusion of all but these railroads from its use, and the law deals with results and not with mere forms in such matters.

Undoubtedly it has been held in many cases in this court that it is a legitimate use of a street to allow a steam railroad track to be laid and operated upon it when there is legislative authority therefor, but it has never been held that under legislative authority merely authorizing tracks to be laid in streets it is competent for a municipality to grant the exclusive use of a street to a railroad company. The leading case on this question is *Moses v. Pittsburgh etc. R. R. Co.*, 21 Ill. 516. It was there sought to enjoin the laying of a railroad track in a street, and it was held that it was admissible for a common council, invested with legislative authority to that end, to authorize a railroad track to be laid in the street, because streets are for no exclusive mode of passage of persons and property,

and therefore all modes may be tolerated. The gist of the reasoning is in the following sentence from the opinion of the court: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used."

In *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619, action was brought against the city for permitting a railroad company to obstruct a street by a necessary embankment made for its tracks in approaching a bridge, and the action was maintained upon the ground, in part, that a railroad company cannot be allowed to exclude other uses of the street, and it was, among other things, said in the opinion: "It has, however, been held that a city or village may authorize the laying of railroad tracks in their streets, — that such a use is not inconsistent with the trust for which they are held by the city; but in thus permitting them to be used, the city has no right to so obstruct the streets as to deprive the public and adjacent property holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use." To like effect, also, is *Chicago etc. Co. v. Garrity*, 115 Ill. 155, and *Olney v. Wharf Co.*, 115 Ill. 523; 56 Am. Rep. 178; and so it has been held in Missouri, it is not competent for a city to authorize such use of a street, dedicated as a street, as will destroy it as a thoroughfare for the public: *Dubach v. Hannibal etc. R. R. Co.*, 89 Mo. 486. See, also, *Louisville etc. R'y Co. v. City of Louisville*, 8 Bush. 415.

It is so familiar that we need not stop to demonstrate it, that cities, villages, and towns are only empowered to lay out, open, and improve streets for such public use as that persons and property within the municipality may be legitimately assessed or taxed for payment therefor, and that persons and property within a municipality cannot be legitimately assessed or taxed for the right of way, or the making or improving of a road, for a railroad company alone. This being conceded, authority will in vain be sought for a municipality to devote a street which has been improved and maintained by municipal expense, to an exclusive use for which it has no authority to lay out, open, or improve it. We do not deny that the city has power to widen streets, generally, and that when it has undertaken to do so the motives that may have actuated those in authority are not the subject of judicial investigation; but the purpose for which a thing is done is very different from

the motives which may have actuated those by whom it is done, and is, in the present instance, a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is in all cases limited by the purpose for which it shall be exercised, — as thus, private property may be condemned for public use, but it may be shown that the use in fact is not public, but private: *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 454; *Sholl v. German Coal Co.*, 118 Ill. 427; 59 Am. Rep. 379.

Statutes conferring power to exercise the right of eminent domain are to be construed strictly. Unless both the letter and spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised: *East St. Louis v. St. John*, 47 Ill. 463; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 454; *Sholl v. German Coal Co.*, 118 Ill. 427; 59 Am. Rep. 379. It is not a question whether the person or corporation seeking to exercise it might not do so with as great safety to persons and property as any other person or corporation, or whether it would work out an equitable result to allow a particular person or corporation to exercise it in a given case. The question is purely one of legal power. That person or corporation which the statute says may exercise it for a stated purpose may exercise it for that purpose, but for no other purpose, and no other person or corporation not thus authorized can exercise it for that purpose; and so we held in *Chicago etc. Ry Co. v. Galt*, 133 Ill. 657, that a railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city; and, obviously, if this be true the reverse must also be true, — a city cannot, under authority to condemn property for streets, condemn property for a railroad track, for the principle must be the same.

But may the city here do indirectly, by mere change in the form, that which it cannot do directly? Although the city may not condemn property for the use of the railroad company, yet inasmuch as it may allow railroad tracks to be laid in its streets, may it not first condemn property for itself and then afterward allow the railroad tracks to be laid upon it to the extent of excluding all other uses? But we have seen that under the power merely to authorize railroad tracks to be laid on streets, a city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of the street so long as it shall remain a public street, and here it is shown that the condemnation is for the express purpose

of enabling the city to give an exclusive use of a part of the old street, and thirty feet of additional space, to the exclusive use and occupation of railroad companies. The substance is not to be lost sight of through any mere jugglery in the use of words. This proceeding is, in fact, not for the city, but for the railroad companies. Between condemning for the railroad companies and condemning for the city to then give to the railroad companies, there is, in legal effect, and so far as concerns this case, no difference,—they are precisely the same thing.

We also fail to find any authority in the law to condemn and fill up Ogden Slip. The evidence is much less satisfactory as to what this slip is than it should have been. There is enough, however, to show that it is a navigable waterway, connected with the south branch of Chicago River, and appurtenant to appellant's lots. A map in evidence shows its location, and it was spoken of by witnesses, without objection, as appurtenant to these lots, and as a waterway. Thus, George M. Bogue said he had examined appellant's lots fronting on Ogden Slip; considered it as having a dock frontage. Edward Campbell said that he was familiar with Ogden Slip. "Travel has been obstructed by vessels heavily laden getting stuck there in the slip; mostly in the summer time; vessels laden with coal. The slip was used but little last summer, mostly by canal boats for the stone yard. Larger vessels have not used the slip lately." Edward C. Huling said that appellant's property had a water front, and could receive from ships. "The closing up the slip,"—i. e., Ogden Slip,— "would shut off all water front." There are other references in the testimony of the witnesses of like character, but these we think sufficient.

The right of navigation and the right of crossing the waterway are equal. Both are to be exercised, and the rights of each are to be guarded: *Illinois River Packet Co. v. Peoria Bridge Ass'n*, 38 Ill. 467. When a franchise is granted to construct ways or streets across a waterway, there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired: *Elliott on Roads and Streets*, 32 et seq. If it be conceded that the state may authorize the taking or destruction of a waterway it devolves on those who claim that the state has done so, to show it, and since that is not done by simply showing power to lay out, open, and improve streets across waterways, no such power is

here shown. Power is given the city by the thirty-first clause of section 1, article 5, chapter 24, of the revised statutes of 1874, page 218, "to construct and keep in repair canals and slips for the accommodation of commerce," but we have found no power granted to the city to close them and fill them up.

We think, construing as we do the two ordinances as one, the condemnation adjudged is for a purpose unauthorized by law, and the court erred in admitting the ordinances in evidence and in rendering judgment as it did.

The judgment is reversed.

CRAIG and BAILEY, JJ., dissenting.

MUNICIPAL CORPORATIONS — STREETS, EXCLUSIVE RIGHT TO USE OF. — A municipal corporation cannot, without clear legislative authority, grant the exclusive right to the use of streets for certain purposes to an individual or corporation: *Cincinnati etc. R'y Co. v. Telegraph Ass'n*, 48 Ohio St. 390; 29 Am. St. Rep. 559, and note; *Mayor v. Houston etc. R'y Co.*, 83 Tex. 548; 29 Am. St. Rep. 679, and note with cases collected.

RAILWAYS, USE OF STREETS BY. — The right given to a railroad to lay its tracks and use them in one of its streets is subject to the right of the public to use such a street: *Chicago etc. R. R. Co. v. Quincy*, 136 Ill. 563; 29 Am. St. Rep. 334, and note; *Rascher v. East Detroit etc. R'y Co.*, 90 Mich. 413; 30 Am. St. Rep. 447, and note.

EMINENT DOMAIN — CONSTRUCTION OF STATUTES CONFERRING TO EXERCISE RIGHT OF. — The exercise of the right of eminent domain is in derogation of private rights, and the authority to exercise it must be strictly construed: *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722, and note; *Bird v. Wilmington etc. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739, and note; *Sharp v. Johnson*, 4 Hill, 92; 40 Am. Dec. 259, and note; *Harding v. Goodlett*, 3 Yerg. 40; 24 Am. Dec. 546; *Lockwood v. Gehlert*, 127 N. Y. 241. See note to *Appeal of Sharon R'y Co.*, 9 Am. St. Rep. 141.

EMINENT DOMAIN — CONDEMNATION FOR SPECIAL PURPOSE. — Land condemned and taken for special purposes is limited to such purposes and cannot be appropriated to another use. *O'Neal v. City of Sherman*, 77 Tex. 182; 19 Am. St. Rep. 743; *Fulton v. Short Route etc. Transfer Co.*, 85 Ky. 640; 7 Am. St. Rep. 619; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722, and note; *Chicago etc. R'y Co. v. Galz*, 133 Ill. 657.

SCHAFFNER v. EHRMAN.

[139 ILLINOIS, 109.]

BANKS — DAMAGES FOR WRONGFULLY REFUSING TO PAY CHECK. — When a banker refuses to pay the check of a person engaged in trade, who has sufficient funds on deposit for that purpose, he is entitled to substantial damages without proof of malice or special injury to the depositor.

Jacob Newman, for the appellants.

Blum and Blum, for the appellees.

WILKIN, J. Appellants were bankers in the city of Chicago. From 1886 to May 31, 1888, appellees, in the course of their business as wholesale and retail liquor dealers in said city, deposited money in appellants' bank, and from time to time drew checks against the same. On the fourth day of said May the bookkeeper of the bank by mistake charged two checks, amounting to \$125, drawn by Ehrman & Co., to appellees, whose account on the bank's books stood next above that of said Ehrman & Co. By this mistake appellees' deposit was shown by said books to be \$125 less than it in fact was. On the twenty-eighth of that month appellees drew their check on the bank for \$249, payable to the order of the firm of Schufeldt & Co., which was duly presented on the same day, through the clearing-house at Chicago, and payment refused for want of funds, and so returned through said clearing-house. The next day, the holders, Schufeldt & Co, telegraphed appellees of the refusal of the bank to pay. This led to a careful examination of the account, and upon comparing appellees' pass or deposit book with the books of the bank, the above-mentioned mistake was discovered. Thereupon the bank immediately wrote a letter to Schufeldt & Co. explaining how the error had occurred, and that the check should have been paid, appellees having sufficient funds in the bank at the time it was presented, for full payment. Appellees closed their account with the bank and all their checks were returned, whereupon they discovered that payment of two other checks drawn by them during that month had also been refused for want of funds, but upon being presented a second time were paid, they having between the first and second presentations of said checks made deposits sufficient to pay them. This action was brought by appellees against appellants to recover damages alleged to have been sustained by the refusal to pay these several checks. The case was tried in the circuit court

of Cook County, without a jury, and judgment rendered for plaintiffs for \$450 and costs of suit, which judgment has been affirmed by the appellate court.

Appellants requested the circuit court to hold, as a proposition of law applicable to the case, that to entitle plaintiffs to recover more than nominal damages they must prove that they had sustained actual or substantial damages, or that the defendants acted from malicious motives in refusing payment of the checks in question, and that the law will not, without proof of special damages, presume that by the dishonoring of the checks plaintiffs sustained special or substantial damages; but the request was denied. The case turns upon the correctness of this ruling.

The refusal to pay these checks was the result of a mere error in bookkeeping, and not made from any express motive to injure appellees. It was shown on the trial, by other bankers, that such mistakes are liable to occur in any bank, and cannot be wholly avoided. One of appellees testified on this trial that he had written a letter to the payee of one of said last named checks, residing and doing business in Philadelphia, requesting him to have his agent call upon their firm, which agent had previously called on them to solicit orders, as they wished to purchase goods, but he never received any reply to the letter, never saw the agent, heard nothing either from the agent, or from the house, or any other person, concerning said check or said letter. He also testified that the check drawn in favor of said Philadelphia house had been protested for non-payment when payment was refused on the first presentation. This was the only evidence from which it could be inferred that actual loss or injury resulted from the non-payment of either of said checks, and it would not be sufficient to sustain a judgment for more than nominal damages, if substantial damages can only be allowed in such cases upon proof of actual damages or loss.

The question, therefore, is, What is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor? Authorities are not numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. The leading case is that of *Rolin v. Stewart*, 14 Com. B. 595. In that case there was no evidence of malice in fact nor of special

damages; but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks, and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the direction to the jury was correct, the case being likened to that of a slander of a person in the way of his trade. Williams, J., said: "I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages; and when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for slander of a person in the way of his trade, the action lies without proof of special damages."

This case was cited with approval in *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92, in which Martin, B., says: "Now, with respect to damages in general, they are of three kinds: First, nominal. The second kind is general damages, and their nature is clearly stated by Creswell in *Rolin v. Stewart*, 14 Com. B. 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man."

In Woods' *Mayne on Damages*, 1st Am. ed., sec. 8, p. 12, the rule is announced that "when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damages might be given at once; citing the case of *Rolin v. Stewart*, 14 Com. B. 595; and text-writers, without exception, seem to approve of the rule announced in that case: See Bishop on Non-contract Law, sec. 49; 1 Sutherland on Damages, 129.

In 3 Am. & Eng. Ency. of Law, 226, it is said: "The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but if unable to do so, he may recover such temperate damages as will be a reason-

able compensation for the injury he has sustained," citing authorities. "Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages": 5 General Digest of the United States Ann. 283, citing *Patterson v. Marine Nat. Bank*, 130 Pa. 419; 17 Am. St. Rep. 779, and other authorities. In the Pennsylvania case the point is directly decided. The ground upon which substantial damages is there held recoverable is that of public policy. We have also examined the text-books on the subject of banks and banking within our reach, and find that they uniformly, so far as they treat of the subject, approve of the rule as announced in *Rolin v. Stewart*, 14 Com. B. 595.

We are of the opinion that the conclusion in that case was reached by proper reasoning. It is well understood that in an action for slander by a person for the speaking of slanderous words of him in the way of his trade, the fact that he is a trader takes the place of special damages. To return a check marked "Refused for want of funds" to the holder, especially through a clearing-house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it needs no argument to show that a single refusal of that kind might often, and frequently does, bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specifically in what manner he has been injured.

It is said, however, that in an action for slander the recovery is had because of slanderous words spoken maliciously, and here it is said there was no malice whatever. While it is true that in slander malice is the gist of the action, yet the term "malice" is always used in such cases in a legal sense. As was said by Dayley, J., in *Bromage v. Prosser*, 4 Barn. & C. 247, which was an action for slander of a bank, the words being in substance that it had stopped payment: "Malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse; and if I traduce a man, whether I know him or not, and whether I intend to do him injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a rem-

edy against me for the injury it produces?" So here, the bank wrongfully refused to pay the checks of the appellees. That refusal was intentional and without just excuse. There was, therefore, all the elements of legal malice, although there might have been no intention to injure the appellees: See 1 Starkey on Slander, 191; *Commonwealth v. Bonner*, 9 Met. 410.

We cannot say that the damages allowed in this case were excessive, under all the circumstances proven. The judgment of the appellate court will be affirmed.

Judgment affirmed.

Mr. Justice CRAIG dissenting, on the ground that the action, though in case was predicated upon a contract; and the plaintiff was therefore not entitled to recover any other than nominal damages, no actual damage being proved.

BANKS — CHECKS — DUTY WITH REGARD TO PAYMENT OF. — The refusal of a bank to honor a depositor's check, without legal excuse, entitles him to recover substantial damages: *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419; 17 Am. St. Rep. 778; *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649, and note; extended note to *In re Franklin Bank*, 19 Am. Dec. 422. The contract arising by implication from a deposit in a bank is that the bank will pay out the money when required in such sums and to such persons as the depositor may indicate by his checks: *Freeholders v. Newark Nat. Bank*, 48 N. J. Eq. 51; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669, and note. Ordinarily a bank must pay the checks of its depositors, unless it has notice that the deposit belongs to another: *Armour-Cudahy Packing Co. v. First Nat. Bank*, 69 Miss. 700.

WHITE v. PEOPLE.

[139 ILLINOIS, 143.]

CRIMINAL CONSPIRACY — WHAT CONSTITUTES. — When two persons have a common design to do an unlawful act, whatever act one of them does in furtherance of the common design is the act of both, for which both are equally guilty.

CONSPIRACY TO RESIST ARREST — COMMON DESIGN NECESSARY TO CONSTITUTE. — When one of two persons resisting arrest shoots an officer in the presence of the other, the latter will not be liable for the shooting, in the absence of a common design between them to resist arrest, although the party not shooting may have an intent to resist arrest without reference to the intent of the other party.

CONSPIRACY TO RESIST ARREST — AIDING AND ABETTING BY SIGNS AND MOTIONS. — When one of two persons resisting arrest aids, abets, advises, or encourages the other by signs or motions to assault the arresting officer, he is guilty of such assault the same as if made by him personally.

CONSPIRACY WITH INTENT TO KILL — COMMON DESIGN NECESSARY TO CONSTITUTE. — The mere presence of a party at an assault with intent to kill is not sufficient to constitute him a principal, unless there is something in his conduct showing a common design to encourage, incite, or in some manner aid, abet, or assist the assault. Aiding, abetting, or assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor.

Drennan and Hogan, for the plaintiff in error.

James B. Ricks, Joseph C. Creighton, and George Hunt, attorney-general, for the people.

MAGRUDER, C. J. This is an indictment in the circuit court of Christian County against the plaintiff in error for assault with intent to commit murder upon the person of one W. A. Jordan by shooting him. He was found guilty by the jury, and sentenced to three years in the penitentiary.

The material facts are as follows: On March 24, 1890, the plaintiff in error and one Robbins appeared in the village of Assumption in said county, where they were strangers and had never been seen before, with a number of revolvers and knives in their possession, some of which they sold to citizens of that place at prices below cost. Robbins had five or six revolvers and thirty or forty knives. Plaintiff in error sold a revolver to Dr. Tobey for one dollar; Robbins sold three knives worth three dollars to Byron Travis for fifty cents, and three knives worth two dollars and fifteen cents to Herschel Travis for fifty cents.

These circumstances having excited suspicion, Byron Travis called upon W. A. Jordan, the marshal of the village, between five and six o'clock in the evening while he was at supper, and informed him of the conduct of the two strangers. As soon as he had finished his supper, Jordan telegraphed to the city marshal at Pana, and the chief of police at Decatur, to know if they had information of any burglaries, and was told in reply that "articles of that description had been taken over about Paris the nineteenth." Jordan then started out to arrest the two men, and summoned one Joseph Jarrell to assist him. Jordan found Robbins and plaintiff in error sitting on the side of the railroad track, a short distance from the village, about seven o'clock in the evening of March 24th, after dark. He sat down with them and had some conversation about hauling hay. After a few moments Robbins arose and said: "I must go." Jordan swears that he then threw

back his coat, showed his star, and said: "I am the marshal and you must go down town with me." Plaintiff in error swears that he did not know that Jordan was the marshal, and that Jordan did not say he was an officer, nor show his badge. Robbins, who was a low, heavy-set man, and is described as being bow-legged, and walking as if crippled, replied: "I am not going," or "You'll not take me." Jordan answered, "You will," and sprang toward Robbins, who had put his hand in his pocket when the marshal told him he must go to town. Jordan says: "Just as I made the step, he shot me; he was standing in the middle of the track at that time; this defendant (White) stood by the side of the track outside of the rail; I noticed their pockets were heavily loaded; when the heavy-set man fired, he started to run; I fired three shots at him; this defendant then sprang in the track and started to run after him. I shot one shot at him." Jordan was shot in the face, eye, neck, and hand with common shot, and his left eye was put out. As the defendant ran, he threw away his coat, which was afterward found, and in its pockets were one revolver and one knife. Another revolver lay near the coat. Both men escaped. Plaintiff in error was afterward arrested, but Robbins has never been arrested, as we understand the evidence.

Jordan says that when the two men "first got up, they both started off, and when I spoke they both whirled around, and this gentleman here (White) pushed his hands in his pockets." Plaintiff in error swears that he started to run before the first shot was fired, but Jordan swears that four shots had been fired before plaintiff in error began to run. When Jarrell and Jordan started out they separated and went in different directions, so that, when the shooting occurred, Jarrell was too far off to see what occurred, as it was quite dark at the time.

After Jordan stated that the men must go to town with him, there is no evidence that plaintiff in error did anything before he ran away, unless it be that, when first spoken to after he arose from the ground, he whirled around, and put his hands in his pockets. Plaintiff in error did not say that he would not go with the officer; the refusal to go was uttered by Robbins. Plaintiff in error fired no shot; the shot which injured Jordan was fired by Robbins. Jordan says: "This defendant (White) did not make any demonstrations or say a word, except he had his hands in his coat-pockets."

Upon the trial below, a witness named Southwick testified

that he was a hardware merchant in Flora, Clay County, Illinois; that he saw plaintiff in error in Flora in company with two others on the nineteenth, twentieth, and twenty-first days of March, 1890; that the plaintiff in error and those with him were strangers; that the store of witness was burglarized on the night of March 21st, and from twelve to fifteen revolvers, about one hundred knives, and one hundred cartridges were stolen therefrom; that the property taken was worth from seventy-five to one hundred dollars; that the witness saw plaintiff in error in Flora across the street from his store on the morning after the burglary. Southwick identified one of the revolvers as his, and swore that the other goods were of the same kind as those stolen from him, but could not swear positively that all had been taken from his store.

Upon the state of facts thus detailed, the court told the jury, in the seventh instruction given for the prosecution, that if they believed, from the evidence in the case, beyond a reasonable doubt, that the defendant and one Robbins stole the property offered in evidence in this case from J. H. Southwick in Clay County, Illinois, and carried the same to Assumption, Illinois, and were there trying to sell said property, and that the prosecuting witness, Jordan, was village marshal of Assumption at said time, and had reasonable ground to believe that said defendant and Robbins were in possession of stolen property, then it was his duty to apprehend and arrest them; "and if, while attempting to arrest them, one Robbins shot the said Jordan with intent to kill him, then this defendant, John White, would be guilty of said shooting, just the same as if he had fired the shot himself — provided you further believe from the evidence, beyond a reasonable doubt, that the defendant intended to resist the arrest by using extreme violence." We think that this instruction was erroneous for the reasons hereinafter stated.

If plaintiff in error and another had a common design to do an unlawful act, then, in contemplation of law, whatever act such other person did in furtherance of the original design would be the act of both, and both would be equally guilty of whatever crime was committed: *Hanna v. People*, 86 Ill. 243. The instruction does not proceed upon the assumption that the shooting was done by Robbins while he and plaintiff in error were engaged in the unlawful act of robbing Southwick's store, or while he and plaintiff in error were engaged in the unlawful act of concealing or disposing of the stolen property

in their possession. The theft, and the possession of the stolen property, and the efforts to sell it, are simply referred to as showing the authority and duty of Jordan to make the arrest. If the instruction can be construed as asserting that the defendant and Robbins had a common design to do an unlawful act, the only unlawful act to which it so refers is resistance of arrest.

But the instruction does not submit to the jury the question whether or not the defendant and Robbins had combined, or formed a common design or common intention, to resist arrest by the officer. As defendant did not do the shooting himself, he could not be held responsible for the shooting done by Robbins, unless he combined with Robbins to resist the arrest, or unless the shot was fired in the attempt to execute a purpose common to both Robbins and himself. The instruction, however, ignores the idea of a common design, or conspiracy, between the two men. The intent to kill is presented as the individual intent of Robbins, and the defendant is asserted to be equally guilty with Robbins, if he had the intention to resist arrest, even though he had formed such intention in his own mind without reference to Robbins, and independently of the question whether or not such intention was entertained in pursuance of a common design formed between himself and Robbins.

In the respect indicated the instruction was erroneous, and in view of the extreme meagerness of any evidence which tended to connect the defendant with the unlawful attempt of Robbins to resist arrest, it was important that the jury should be accurately instructed. There is nothing to show that plaintiff in error and Robbins had formed any common design to resist arrest, or had even anticipated that an effort would be made to arrest them. Only a few seconds elapsed between the announcement of Jordan that he wanted them to go to town with him and the advance of Jordan toward Robbins, which induced the latter to fire the shot. The two men did not know that Jordan was an officer until said announcement was made, and there was no opportunity for any combination between them in view of the darkness and the other circumstances surrounding them. It is true that the plaintiff in error would have been responsible if he had aided, or abetted, or advised, or encouraged Robbins in his unlawful conduct by signs or motions: *Brennan v. People*, 15 Ill. 511; but beyond the mere fact that the plaintiff in error turned around

and put his hands in his coat pockets when Jordan stated that they must go to town with him, he made no sign or motion of any kind until he ran away. The turning around was not necessarily a threatening movement, but rather a natural one, in view of what Jordan said, and in view of the surprise at the discovery that the man who had been talking about hauling hay was an officer.

It is true that a revolver was found in the pocket of the coat after it was thrown away, but the possession of the revolver under the circumstances of this case did not necessarily indicate that it was intended to be used in resistance of arrest, as it was a part of the property that had been stolen, and which the possessors of it were trying to dispose of.

But even if the acts of the plaintiff in error in turning around and putting his hands in his pockets did indicate an intention on his part to resist arrest, there is no proof that Robbins saw either of these acts, or that they were intended as signs to Robbins that plaintiff in error would unite with him in an attempt to resist arrest. The mere presence of a party at an assault with intent to kill is not sufficient to constitute him a principal, unless there is something in his conduct showing a design to encourage, incite, or in some manner aid, or abet, or assist the assault. Aiding, abetting, or assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor: *White v. People*, 81 Ill. 333; *Lamb v. People*, 96 Ill. 73; 9 Am. & Eng. Ency. of Law, 574, 575. Here it appears from the evidence of the prosecution that the plaintiff in error stood outside of the track with a pistol in his possession until after Jordan had fired three shots at Robbins, and not only took no part in the assault, but made no "demonstrations" whatever, either of encouragement to Robbins or of hostility toward Jordan.

After a careful examination of the evidence in this case in connection with the instructions, we are unable to say that it so far tends to sustain the verdict as to justify us in affirming the judgment.

The judgment of the circuit court is reversed, and the cause is remanded.

CONSPIRACY—LIABILITY OF ONE CONSPIRATOR FOR ACT OF ANOTHER. — The act of one of several conspirators in the prosecution of their design is considered the act of all: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 321, and extended note at p. 487; *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep.

901; *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91, and note. The acts or declarations of one of several conspirators in the furtherance of an unlawful common design and forming part of the *res gestæ* are admissible in evidence against the others: *Clark v. State*, 28 Tex. App. 189; 19 Am. St. Rep. 817, and note; extended note to *Spies v. People*, 3 Am. St. Rep. 487.

CONSPIRACY — COMMON DESIGN NECESSARY. — Common design is the essence of the charge of conspiracy: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note at p. 475; *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91; but see *Spencer v. State*, 77 Ga. 155; 4 Am. St. Rep. 74.

CONSPIRACY TO ASSAULT WITH INTENT TO KILL: See *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96. See extended note to *People v. Richards*, 51 Am. Dec. 82-94, for a discussion of conspiracy.

AMBLER v. WHIPPLE.

[139 ILLINOIS, 311.]

JUDGMENTS OF SISTER STATE — LIMITATION AGAINST. — A judgment or decree rendered by a court of another state, or by the supreme court of the District of Columbia, is, in Illinois, barred in five years after a cause of action accrues thereon.

STATUTES — CONSTRUCTION OF. — A statute should be so construed as to make it consistent in all its parts, and so that proper effect may be given to every section, clause, or part of it.

JUDGMENT IS EVIDENCE OF INDEBTEDNESS IN WRITING, but it does not necessarily follow that judgments are to be placed on the same footing with rights of action on bonds, notes, bills of exchange, leases, contracts, or other evidences of indebtedness in writing enumerated in a statute fixing the period of limitation thereon.

STATUTES — CONSTRUCTION OF. — The words of one statute may be required to be enlarged in their meaning, while in another statute the language may from the context be necessarily limited and contracted in its scope and operation.

STATUTES. — CONSTRUCTION OF GENERAL WORDS in a statute following an enumeration of particular cases, apply to cases of the same kind and description. A statute enumerating things inferior cannot, by general words, be construed so as to extend to and embrace those which are superior.

JUDGMENT WHEN AN ESTOPPEL. — A judgment for the payment of money is evidence of indebtedness of the highest dignity known to the law; and, unlike evidence of indebtedness afforded by bonds, bills, leases, and written contracts, it imports verity and operates as an estoppel to deny its truthfulness.

PRACTICE. — WHEN ANSWER IS FILED AFTER DEMURRER OVERRULED, the demurrer is waived and the ruling thereon cannot be assigned for error.

PRACTICE — MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO. — When a plea presenting a bar to the right to recover is interposed, and a demurrer thereto is overruled, a motion for judgment *non obstante veredicto* should be overruled.

JURY TRIAL — INSTRUCTIONS DIRECTING VERDICT. — The court may properly instruct the jury to return a verdict for the defendant when the evidence,

with all the inferences to be drawn therefrom, is so insufficient to support a verdict for the plaintiff that the court will be compelled to set it aside. The court may direct a verdict for the defendant if there is no evidence tending to prove an issue of fact essential to the right of recovery of the plaintiff; but such an instruction is properly refused if there is a conflict in the evidence and there is evidence tending to prove the plaintiff's case.

JUDGMENTS AND DECREES RENDERED IN SISTER STATES by courts of record have the same conclusive effect in other states as they have in the state where rendered, and the rule that judgments of sister states are conclusive on the merits extends with equal force to decrees in chancery.

JUDGMENTS AND DECREES OF FEDERAL COURTS are entitled to the same degree of faith and credit as those of state courts.

JUDGMENTS IN PERSONAM OF SISTER STATES are placed on the same footing as domestic judgments, and entitled to the same credit and effect, when sought to be enforced in the different states, as they, by law or usage, have in the particular states wherein they were rendered.

JUDGMENTS OF SISTER STATES — LIMITATION AGAINST. — A judgment valid and conclusive in the courts of the state where rendered will be enforced in the other states upon the same footing as domestic judgments within such period of limitation as may be prescribed in respect to such judgment by the law of the state where it is sought to be enforced.

JUDGMENTS OF SISTER STATES — PLEA OF FRAUD AGAINST. — A plea of fraud is not admissible in actions on judgments of sister states, when there was jurisdiction of the person and subject-matter, unless it can be set up in the court of the state rendering such judgment. The judgment in such case is not void, but voidable merely.

JUDGMENTS — COLLATERAL ATTACK. — Domestic judgments and those standing upon like footing, as the judgments of sister states, import verity, and public policy forbids their indirect collateral contradiction or impeachment.

JUDGMENT — HOW VACATED FOR FRAUD. — When a party is prevented by fraud or fraudulent misrepresentations from interposing his defense before judgment is rendered he may apply to that court for its annulment and to be let in to defend on the merits; but a plea of fraud in procuring such judgment is not a proper plea to an action thereon.

ACTION of debt brought July 17, 1885, on a judgment of the supreme court of the District of Columbia, rendered June 17, 1880, in favor of appellant and against the appellee and another for \$667,434.21. The defendant interposed five pleas: 1. That the cause of action did not accrue within five years prior to the commencement of the suit. 2. *Nul tiel* record. 3. That there was no personal service or appearance of defendant in the court rendering the decree. 4. That such decree was obtained by fraud and false representations on the part of plaintiff, which caused him to fail to interpose any defense. 5. Discharge in bankruptcy and failure to plead the same because of such fraudulent representations by plaintiff. A demurrer was overruled as to the first plea, but sustained as

to pleas four and five. The second and third pleas were withdrawn. Plaintiff filed two replications to the first plea: 1. The absence of defendant from the state when the cause of action accrued, and the commencement of suit within five years after his return to the state. 2. That after the action accrued defendant departed from and resided out of the state from June 27, 1880, for about one year. Upon these replications issue was taken and trial had. The court instructed the jury that "the evidence presented in this case is not sufficient to warrant a verdict for the plaintiff upon the issues submitted, and you will therefore find a verdict for the defendant." The jury returned a verdict for defendant, and plaintiff moved for judgment *non obstante veredicto* for the amount of the decree sued on, with interest, which motion was overruled. Judgment on the verdict. Plaintiff appealed to the appellate court where the judgment was affirmed, and the plaintiff below prosecutes this appeal.

James R. Doolittle and Henry Booth, for the appellant.

A. I. Ambler, and Stiles and Lewis, for the appellee.

SHOPE, J. The principal question for consideration in this case is, whether an action on a judgment or decree rendered by a court of another state, or by the supreme court of the District of Columbia, is within this state barred in five years after the cause of action accrues thereon. This question was decided in the affirmative by this court in the case of *Bemis v. Stanley*, 93 Ill. 230. That was an action of debt upon a judgment rendered in the state of Ohio. The defendant pleaded that the cause of action did not accrue within five years next before the action was brought, to which the circuit court sustained a demurrer, so that the precise questions here raised were there presented. The statute then in force was the same as that now in force. We held that the case fell under the fifteenth section of the limitation act of 1871-72, in force July 1, 1872, and reversed the judgment of the circuit court for error in sustaining the demurrer and holding that the plea presented a bar to the action. The propriety of that ruling is seriously questioned, and we are asked to reconsider and overrule the decision in that case.

It is claimed that a judgment or decree of a court of record of a sister state or of a federal court is evidence of indebtedness in writing, and that therefore the limitation of actions thereon is ten years, as provided in section 16 of our limita-

tion act, and it is urged that section 16 was not considered by the court in the determination of *Bemis v. Stanley*, 93 Ill. 230. It is true we there said, "the decision of this question involves a construction of sections 15 and 20" of the limitation law. The construction of those sections was clearly involved, but it by no means follows that the court did not consider other parts of the act. A statute should be so construed as to make it consistent in all its parts, and so that proper effect may be given to every section, clause, or part of the act: *Illinois Central R. R. Co. v. Chicago etc. R. R. Co.*, 122 Ill. 473; *Hunt v. Chicago Horse and Dummy R'y Co.*, 121 Ill. 642; *Steere v. Brownell*, 124 Ill. 29.

The opinion in the *Bemis* case shows, as we think, that section 16 of the limitation act was within the contemplation of the court. In speaking of section 15 of the act, it was said: "An action brought in this state upon a judgment rendered in another state is undoubtedly a civil action, within the intent and meaning of this section of the statute, and unless some other section of the act has provided a period of limitation to govern the time within which an action shall be brought in this state upon a foreign judgment, then section 15 must control. . . . Our view of the subject is, that section 15 is broad enough to embrace the judgment sued upon in this case; that the suit on the judgment is a civil action, not otherwise specifically provided for, and hence barred in five years by the terms and conditions of the statute."

Section 16 of the act which is claimed to govern in this case is as follows: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." It is said that the words "other evidence of indebtedness in writing" necessarily include judgments, and therefore the limitation of actions upon such judgments is ten years, instead of five years, as provided in section 15. These words alone, without the words preceding, are clearly broad enough to include judgments and decrees for the payment of money.

We held in *Jefferson v. Alexander*, 84 Ill. 278, and perhaps in other cases also, that a judgment is an evidence of indebtedness in writing, from which ruling we find no occasion to recede. It does not, however, necessarily follow that a judgment is such "other evidence of indebtedness in writing" as to be included within the sixteenth section of the statute. It

is familiar that words of one statute may be required to be enlarged in their meaning, while in another statute the language may, from the context, be necessarily limited and contracted in its scope and operation: *Gormley v. Uthe*, 116 Ill. 645. It is also a general rule of statutory construction, that general words, following an enumeration of particular cases, apply to cases of the same kind and description; and so a statute enumerating things inferior shall not, by general words, be construed so as to extend to and embrace those which are superior: Sedgwick on Const. & Stat. Law, 361; 1 Bla. Com. 88; *Woodworth v. Paine*, Breese, 374; *Hall v. Byrne*, 1 Scam. 140. In the case last cited a statute allowing a defense denying the consideration in actions on notes, bonds, bills, and other instruments in writing for the payment of money, etc., was held not to apply to mortgages, the court saying: "Mortgages are clearly instruments of a higher dignity than bonds, promissory notes, or bills, because greater solemnity is required in their execution."

A judgment for the payment of money is evidence of indebtedness of the highest dignity known to the law, and unlike the evidence of indebtedness afforded by bonds, bills, leases, and written contracts, it imports verity. It operates as an estoppel on the party to deny its truthfulness. In *Rae v. Hulbert*, 17 Ill. 572, the defendant pleaded a set-off against the judgment sued on, which was disallowed on demurrer. It was contended in that case that the statute allowed a plea of set-off in an action on a judgment. The statute authorized the plea "in any action brought upon any contract or agreement, either express or implied." This court there said: "We cannot agree with counsel that a judgment is a contract, within the meaning of the statute. It is the conclusion of the law upon the rights of the parties, and it is not very common that it is entered up by the agreement of the unsuccessful party, but the reverse is generally the case. In this statute the words 'action,' 'contract,' and 'agreement' are used in their ordinary sense, and not with the intention of embracing every imaginable litigation upon every cause of action. A judgment is no more a contract than is a tort."

Without pursuing this branch of the subject further, it seems quite clear that a judgment is not evidence of indebtedness in writing of the like character, nature, or grade with notes, bonds, bills, written leases, or written contracts enumerated in section 16, in advance of the general words which,

it is contended, create a bar in actions upon judgments, but are evidences of indebtedness in writing of a higher and superior character. It cannot therefore be presumed to have been included with those enumerated of a lesser grade, although the effect may be to exclude such superior evidence of indebtedness from the operation of the act altogether, or to impose a shorter period of limitation under another provision of the statute.

The first section of the act of November, 1849, for which section 16 of the present act is a substitute, reads as follows: "All actions founded upon any promissory note, simple contract in writing, bond, judgment, or other evidence of indebtedness in writing, caused or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter." It will be observed that the later statute omits the word "judgment" before the general clause, "or other evidence of indebtedness in writing." It is to be presumed that by the change in the phraseology some change was intended to be made in the rule of law, and would clearly indicate an intention to exclude judgments from the operation of the later enactment. It cannot be presumed that the omission was accidental, nor can a misapprehension of the legislature as to the effect of the change in the law be inferred.

In construing this section it is proper to consider it with reference to the state of the law before its adoption: *Wright v. People*, 101 Ill. 126; *Wabash etc. R'y Co. v. Binkert*, 106 Ill. 298. By the twenty-fourth section of the act, prior limitation statutes are expressly repealed. By the fifth section of chapter 66 of the revision of 1845, actions of debt on judgments of courts of record of this state might be brought within twenty years after the date of the judgment, and not thereafter. Actions upon other judgments were not specifically limited by that statute. However, other actions of debt and covenant were limited, by the fourth section of the statute, to sixteen years after the cause of action accrued. By the first section of the act of February 10 (in force April 13), 1849, actions upon judgments rendered beyond the limits of this state were limited to five years after the right of action accrued.

As we have seen, by the first section of the act in force November 5, 1849, all actions upon "judgments" were required to be brought within sixteen years after the cause of action accrued, and not thereafter. By the fourth section of the lat-

ter act so much of chapter 66 of the revised statutes of 1845 and of the act of February 10, 1849, as was in conflict with that act was repealed. If it be conceded that the general provisions of section 1 of the act of November, 1849, had the effect to repeal section 5 of chapter 66, creating the limitation of actions on judgments of courts of record in this state, and also section 1 of the act of February 10, 1849, relating to actions on foreign judgments, or judgments "rendered beyond the limits of this state," it follows that the limitation of actions upon all judgments was sixteen years. It is apparent that section 15 of the present act was passed, in the main, to take the place of the first section of the act of 1845 and the second section of the act of November, 1849, with the provision added in respect of "all civil actions not otherwise provided for," and limiting the bringing of all such actions to five years after the cause of action accrued. It is to be observed, however, that in the earlier act of 1849, judgments rendered outside of the limits of this state are classed with causes of action limited by the fifteenth section of the present act to five years. In neither the act of 1845 nor of November, 1849, are such judgments specifically mentioned. In the former, the limitation is of judgments rendered within this state, and the latter the limitation is of "action on judgments," without other specifications. The legislature having, by the act of 1871-72, provided a period of limitation of "all civil actions not otherwise provided for," struck the word "judgment" out of section 16, as it stood in section 1 of the act of November, 1849, and made no specific limitation in actions on judgments, whether rendered within or without the limits of the state.

The effect of this legislation was, it seems, to place actions upon all judgments upon the same footing, and make the like period of limitation applicable to all. Without distinction, therefore, they would, there being no other provision, fall either under section 15 or section 16 of the present statute. If the legislature intended section 16 to apply, it is inconceivable why the word "judgment" was omitted. It was used in the act of November, 1849, which is expressly repealed by the present statute, and expressed the exact intention now attributed to the legislature by the passage of section 16. Yet it is omitted from that section, after inserting in a preceding section of the act a new provision, within which actions upon judgments would appropriately fall. That actions upon judg-

ments are "civil actions" cannot be questioned, and "if not otherwise provided for" in the act would necessarily be limited by section 15. In the completion of the revision, the legislature, in 1873, had its attention again called to the subject, and after amending section 18 of the act of 1871-72, changed the limitation of actions upon domestic judgments. By section 3 it is provided that actions of debt may be brought on judgments of courts of record of this state within twenty years after the date thereof, and not thereafter, thus restoring the fifth section of the act of 1845 in its exact phraseology.

There is, it is apparent, nothing inconsistent in the legislation under consideration with the previous policy of the state. The third section of the act of 1873, as we have seen, took judgments of courts of record of this state out of the operation of the act of 1871-72, and fixed the limitation at twenty years leaving actions on judgments rendered outside of this state, and judgments of courts not of record within this state, to be governed by section 15 of the latter act.

The case of *Stelle v. Lovejoy*, 125 Ill. 352, is not in conflict with the view here expressed. It was not necessary there to decide when actions on justices' judgments are barred under this statute. That was an action on an appeal bond, given upon appeal from a judgment of a justice of the peace. We there said: "It might be conceded that actions on the judgment in the justice's court would be barred in a shorter period; but that fact could not affect the remedy on the covenant" contained in the bond. We are of opinion that limitation of actions upon judgments, other than those rendered by courts of record of this state, are controlled by section 15, and therefore barred in five years.

If a party plead over after demurrer overruled, as was here done, the demurrer is waived, and the ruling thereon cannot be assigned for error. But the question considered is presented by the order overruling appellant's motion for judgment *non obstante veredicto*: 1 Gould's Pl. 474, sec. 31; *Woods v. Huges*, 1 Scam. 103. The plea presenting a bar to the right of recovery, the motion was properly overruled.

The action of the court in withdrawing the case from the jury is also assigned for error. The replications to the plea presented proper issues of fact to be submitted to the jury, and the plaintiff was entitled to have a finding upon such issues, if the evidence tendered by him tended to sustain them. The court may properly instruct the jury to return a

verdict for the defendant, when the evidence, with all the inferences that may be justly drawn therefrom, is so insufficient to support a verdict for the plaintiff that the court will be compelled to set it aside. Thus, the court may direct a verdict for the defendant if there is no evidence tending to prove an issue of fact essential to the right of recovery of the plaintiff: *Alexander v. Cunningham*, 111 Ill. 511; *Chicago etc. R'y Co. v. Carey*, 115 Ill. 117; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 478; 59 Am. Rep. 810. But such an instruction is properly refused if there is conflict in the evidence, and there is evidence tending to prove the plaintiff's case: *Chicago etc. R'y Co. v. Krueger*, 124 Ill. 457; *Doane v. Lockwood*, 115 Ill. 494.

With the view of determining the correctness, or otherwise, of this instruction, we have considered the evidence given at the trial, and without entering upon a discussion of its weight and effect, we are of the opinion that the court erred in directing a verdict for defendant. We are not required to pass upon the preponderance of evidence, nor was the trial court. For the court to do so would be to invade the province of the jury, and in effect destroy the right of trial by jury. An examination of this record will show that there was evidence from which, if uncontradicted, the finding might well have been for the plaintiff. It is shown that appellee transacted business in New York City within the period of limitation, requiring his presence in that city for considerable portions of time, and also his repeated admissions and declarations that he resided there. It is true, there is countervailing testimony which may be sufficient to overcome the case thus made by the plaintiff; but to determine that it does or does not, necessitates weighing and considering the evidence, and depends upon whether it shall be found that the preponderance is upon the one side or the other. In every such case the right of trial by jury may not be taken away, although the court may feel that a new trial may properly be awarded.

Appellee has assigned cross-errors, questioning the propriety of the ruling of the court in sustaining the demurrer to his fourth and fifth pleas, which should be considered. These pleas allege that appellee was prevented from interposing a meritorious defense, as he could have done in the original proceeding, by the fraudulent acts and deception of appellant in leading appellee to suppose that the prosecution of that suit was abandoned. It is not necessary here to consider what

defenses may be interposed in actions upon foreign judgments, for the reason that in this respect this judgment is to be treated as a domestic judgment. It has the same conclusive effect as a judgment of a court of record of a sister state. The rule that judgments of a competent court in a sister state are conclusive on the merits extends equally to decrees in chancery: *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; and judgments and decrees of the federal courts are entitled to the same degree of faith and credit as those of state courts: *Ruegger v. Indianapolis etc. R. R. Co.*, 103 Ill. 449; *Embrey v. Palmer*, 107 U. S. 3; *Creston City Live-stock Co. v. Butchers' Union etc. Co.*, 120 U. S. 141; *Dudley v. Lindsey*, 9 B. Mon. 486; 50 Am. Dec. 522; *Harrison v. Phoenix etc. Ins. Co.*, 83 Ind. 575.

In *Rae v. Hulbert*, 17 Ill. 572, we held, quoting from *Welch v. Sykes*, 3 Gilm. 199, 44 Am. Dec. 689, that, "under the constitution of the United States, and the laws made in pursuance thereof, the judgments *in personam* of the various states are placed on the footing of domestic judgments, and they are to receive the same credit and effect, when sought to be enforced in the different states, as they, by law or usage, have in the particular states where rendered"; and we held that we were required to treat and give the same effect to the judgment there under consideration as if rendered in this state, or as if that were a proceeding in the state of New York, where the original judgment was rendered: *Mills v. Duryee*, 7 Cranch, 481; *Renaud v. Abbott*, 116 U. S. 277.

Under the rule thus announced, a judgment valid and conclusive in the courts of the state where it is rendered will be enforced in the other states upon the same footing as domestic judgments, within such period of limitation as may be prescribed in respect of such judgments by the law of the state where it is sought to be enforced. The prevailing doctrine is, that a plea of fraud is not admissible in actions on judgments of sister states, where there was jurisdiction of the person and subject-matter, unless it can be set up in the court of the state rendering the judgment. The judgment in such case is not void, but voidable only: *Anderson v. Anderson*, 8 Ohio, 108; *Bicknell v. Field*, 8 Paige, 440; *McRae v. Mattoon*, 13 Pick. 53; *Sanford v. Sanford*, 28 Conn. 6; *Benton v. Burget*, 10 Serg. & R. 240; *Granger v. Clark*, 22 Me. 128; *McDonald v. Drew*, 64 N. H. 547. The supreme court of the United States has also held that a plea of fraud in obtaining the

judgment cannot be interposed in an action thereon: *Christmas v. Russell*, 5 Wall. 290; *Maxwell v. Stewart*, 22 Wall. 77.

In *Hanley v. Donoghue*, 116 U. S. 4, it is said: "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

Domestic judgments and those standing upon the like footing import verity, and public policy forbids their indirect and collateral contradiction or impeachment. If a party has been overreached, the law furnishes him ample remedy to avoid the consequences of the fraud in the court and jurisdiction where the judgment or decree is rendered. If appellant sought to take judgment contrary to his representations and assurances, appellee might have appeared in that court by himself or solicitor, and prevented its consummation; or if, by the fraud of appellant, he was prevented from interposing his defense before the decree was entered, he might and should have applied to that court for its vacation, and to be let in to defend on the merits: *Rae v. Hulbert*, 17 Ill. 572. We are aware that in some of the earlier cases in this state there seems, in effect, to be a contrary holding, but the rule stated is, we think, as applicable to the courts of law, supported by the weight of authority.

The pleas under consideration do not question the jurisdiction of the supreme court of the District of Columbia of the subject-matter or of the person of the defendant. If it be conceded that the pleas are in other respects sufficient, they do not contain matter that can be interposed to defeat recovery upon the judgment, and the demurrer was therefore properly sustained.

For the error in instructing a finding for the defendant, the judgments of the appellate and circuit courts must be reversed, and the cause is remanded to the circuit court for retrial.

Judgment reversed.

JUDGMENTS OF SISTER STATES — LIMITATIONS AGAINST. — If an action is brought in one state upon a judgment rendered in another, the statute of limitations of the former state must control: *Rice v. Moore*, 48 Kan. 590; 30 Am. St. Rep. 318, and note.

JUDGMENTS AS EVIDENCE OF DEBT DUE. — A judgment is conclusive evidence that it was due to its full amount when recovered: *Bird v. Smith*, 34

Me. 63; 56 Am. Dec. 635, and note; *Bensimer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774, and note. See also extended note to *King v. Chase*, 41 Am. Dec. 681.

JUDGMENTS NON OBSTANTE VEREDICTO. — Where a general verdict is for the plaintiffs accompanied by special findings to interrogatories, which findings are inconsistent with any theory upon which the plaintiffs could recover, the defendant is entitled to judgment *non obstante veredicto*; *Snyder v. Robinson*, 35 Ind. 311; 9 Am. Rep. 738. See also *Benicia Agricultural Works v. Creighton*, 21 Or. 495.

TRIAL — DIRECTING VERDICT. — A verdict may be directed without the consent of the parties whenever the party upon whom the burden of proof lies wholly fails to sustain it by evidence: *People v. Cook*, 8 N. Y. 67; 59 Am. Dec. 451. The court does not always invade the province of the jury by directing a verdict. It has a right to pronounce its judgment upon the legal effect of admitted facts: *Todd v. Old Colony etc. R. R. Co.*, 7 Allen, 207; 83 Am. Dec. 679, and note. Where there is no evidence to warrant the jury in finding a material fact, the judge should direct them that it is not proved: *Storey v. Brennan*, 15 N. Y. 524; 69 Am. Dec. 629, and note.

JUDGMENTS OF NATIONAL COURTS — CONCLUSIVENESS OF: See *McCauley v. Hargroves*, 48 Ga. 50; 15 Am. Rep. 660; *Steinbach v. Relief etc. Ins. Co.*, 77 N. Y. 498; 33 Am. Rep. 655; *Clements v. Odorless Excavating etc. Co.*, 67 Md. 461; 1 Am. St. Rep. 409; *Durant v. Essex Co.*, 8 Allen, 103; 85 Am. Dec. 685. Presumptions which are indulged in in favor of a court of general jurisdiction are equally extended to judgments of the United States courts: *Reed v. Vaughan*, 15 Mo. 137; 55 Am. Dec. 133, and notes; *Ballin v. Loeb*, 78 Wis. 404.

JUDGMENTS OF SISTER STATES — CONCLUSIVENESS OF. — A judgment of a superior court of one state is to be given the same effect in all respects in another state as in the state where rendered: *Barnes v. Gibbs*, 31 N. J. L. 317; 86 Am. Dec. 210, and note; *Memphis etc. R. R. Co. v. Grayson*, 88 Ala. 572; 16 Am. St. Rep. 69, and note; *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; *Weeks v. Harriman*, 65 N. H. 91; 23 Am. St. Rep. 21, and note; *Suydam v. Barber*, 18 N. Y. 468; 75 Am. Dec. 254, and note; *Hallum v. Dickinson*, 54 Ark. 311; *Thomas v. Morrisett*, 76 Ga. 384; *Teel v. Yost*, 128 N. Y. 387; *Harrington v. Harrington*, 154 Mass. 517. See also extended notes to *Hood v. Stote*, 26 Am. Rep. 27-33; *Bartlet v. Knight*, 2 Am. Dec. 42.

JUDGMENTS — COLLATERAL ATTACK UPON: See extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119; note to *Williams v. Haynes*, 19 Am. St. Rep. 755.

JUDGMENTS — HOW VACATED FOR FRAUD. — The remedy against a final judgment on the ground of fraud is by an independent action, and not by a motion in the original cause: *Smallwood v. Trenwith*, 110 N. C. 91; *Carter v. Rountree*, 109 N. C. 29. But see *Sullivan v. Shell*, 36 S. C. 578; 31 Am. St. Rep. 894, and note, and *Dial v. Farrow*, 1 McMull. 292; 36 Am. Dec. 267. See also note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

LURTON v. RODGERS.

[139 ILLINOIS, 554.]

EXECUTION SALES — INADEQUATE PRICE. — When property of the value of two thousand dollars, above all encumbrances, is sold under execution for sixty dollars, the price obtained is grossly inadequate.

EXECUTION SALES — INADEQUACY OF PRICE WHEN A GROUND FOR SETTING ASIDE. — Though mere inadequacy of price will not ordinarily be deemed sufficient of itself to set aside an execution sale, yet it may be considered in connection with other irregularities in the proceedings, and when the inadequacy is great the sale may be set aside upon slight additional circumstances.

EXECUTION SALES EN MASSE, WHEN SET ASIDE. — When property susceptible of division is sold under execution *en masse* for an inadequate price without first being offered in separate parcels, the sale will be set aside, if application is made within a reasonable time.

EXECUTION SALE EN MASSE FOR INADEQUATE PRICE — WHEN SET ASIDE. When city property valued at two thousand dollars, free of all encumbrances, consisting of two lots, each with twenty feet frontage and susceptible of division, is sold under execution *en masse* for sixty dollars, without being first offered separately and in parcels, the sale is irregular, and this, coupled with the gross inadequacy in price, authorizes a decree setting aside the sale and allowing a redemption therefrom.

EXECUTION SALE EN MASSE FOR INADEQUATE PRICE — LACHES IN FILING BILL TO REDEEM. — When city property susceptible of division is sold under execution *en masse*, for a grossly inadequate price, without first being offered for sale in parcels, and the debtor, who was ignorant of the sale and induced to believe that it would not be made through the representations of the creditor, who was the purchaser, files his bill to redeem within ten months after the time of redemption had expired, is not guilty of laches so as to defeat his right to have the sale set aside and to redeem therefrom.

BILL in chancery to set aside a sheriff's deed, and to redeem from the sale in pursuance of which such deed was executed. **Judgment** for the plaintiff. Defendants appealed.

Morrison and Whitlock, for the appellants.

Charles A. Barnes, for the appellee.

CRAIG, J. The evidence as to the value of the property in question at the time it was sold on execution clearly preponderates in favor of the complainant. Seven witnesses were examined as to the value of the property in behalf of complainant. One placed the value at \$3,000, one at from \$2,800 to \$3,000, two at from \$2,500 to \$3,000, one at from \$2,500 to \$2,800, one at \$2,750, and one at \$2,200, the average of their estimates being a little over \$2,700. Three witnesses only testified for the defendants, one placing the value at \$1,500, one at \$1,300, and one at \$1,200. It is therefore plain that

the circuit court was fully justified in adopting the value placed upon the property by complainant's witnesses, and we will presume, in support of the decree, that it did so. It must therefore be regarded as established, for all the purposes of this appeal, that the property, at the time of the sale, was worth at least \$2,700, and upon that basis the value of complainant's equity of redemption, after deducting the amount of the mortgage on the property and all accrued interest, was at least \$2,000. An interest of that value having been sold on the execution for only sixty dollars, no argument is required to show that the price for which the property sold was grossly inadequate. It is true that mere inadequacy of price will not ordinarily be held sufficient, of itself, to set aside a sheriff's sale, yet it may be considered in connection with other irregularities in the proceedings, and where the inadequacy is great the sale may be set aside upon slight additional circumstances: *Bean v. Haffendorfer*, 84 Ky. 685; *Wright v. Dick*, 116 Ind. 538; *Thomas v. Hebenstreit*, 68 Ill. 115; *Dickerman v. Burgess*, 20 Ill. 266; *Dutcher v. Leake*, 44 Ill. 400.

Several irregularities in the transcript and the sheriff's sale have been pointed out and relied upon in the argument of counsel, but in the view we take of the record it will only be necessary to consider one question. The property involved, which was sold on execution, is described as follows: Forty feet off the south side of lots 40, 41, and 42, original plat of Jacksonville. The property has a west frontage of 40 feet on Mauvaisterre Street, running back east 180 feet, with an alley on the south and the east. It consists, as shown by the evidence, of two business lots, 20 feet front and 180 feet deep. The north twenty feet was vacant, but on the south twenty feet a brick business house had been erected two stories high, twenty by sixty feet. The property was located only a half-block north from the northeast corner of the public square in Jacksonville. The sheriff levied on the property as a single tract, and it was sold *en masse* and struck off for the sum of sixty dollars, in plain violation of section 12, chapter 77, of the Revised Statutes of 1874, which reads as follows: "When real or personal property is taken in execution, if the same is susceptible of division it shall be sold in separate tracts, lots, or articles, and only so much shall be sold as is necessary to satisfy the execution and costs." Here the property was susceptible of division, and was regarded, as the evidence shows, as two business lots. There was, it is true, an old frame

building on the east end of the property, in the rear of the brick building, extending from the south to the north line of the property, used as a warehouse, but this did not prevent a division of the property into two lots or parcels of land.

Where property susceptible of division has been sold *en masse* for an inadequate price, this court has held in a number of cases that the sale will be set aside, if application is made within a reasonable time: *Morris v. Robey*, 73 Ill. 462; *Berry v. Lovi*, 107 Ill. 612; *Stoker v. Greenup*, 18 Ill. 28; *Day v. Graham*, 6 Ill. 435. In *Morris v. Robey*, 73 Ill. 462, in deciding the case, it is said: "Although inadequacy of price on an execution sale may be no ground for equitable relief without additional circumstances to justify it, we are of opinion that such additional circumstances do exist in the present case, and that they are to be found in the irregular mode of selling these eight separate lots in gross without having first offered them in parcels of two and more, less than the whole."

What was said in the case cited is applicable here. Property capable of division, worth two thousand dollars clear of encumbrances, was sold *en masse* for the paltry sum of sixty dollars. We are aware of no principle upon which a sale of this character can be sustained. The sheriff had no right to sacrifice the property if it could be avoided, and it is apparent that the way was open to avoid a sacrifice of the property by offering it for sale in parcels. If the north half, twenty feet front by one hundred and eighty feet deep, had been offered for sale, doubtless it would have sold for the debt and costs; but whether it would or not, the law required the sheriff to first offer the land in parcels before he could be justified in selling it *en masse*.

But it is said that the complainant has been guilty of laches, and upon that ground equity will not grant him relief. The property was sold on the execution on the twenty-fifth day of June, 1887, and the time for redemption expired on the twenty-fifth day of September, 1888, and this bill to vacate the sale and redeem was brought July 15, 1889, less than ten months from the time allowed by law for redemption. It is true, as a general rule, where a party desires to make application to set aside a sheriff's sale he ought to do so before the time of redemption expires; but in this case the application is not one strictly to set aside a sale, but the bill prays for leave to redeem from the sale, and the court, as it was proper to do,

granted the relief upon equitable terms, which seems to be in harmony with the former decisions of this court. Thus, in *Stoker v. Greenup*, 18 Ill. 27, a bill was filed to set aside a sale of land on execution, setting out facts similar to those relied upon here. The court refused to vacate the sale absolutely, but allowed an equitable redemption, as prayed for here. It is there said: "But Stoker for some three years slept on his rights, neither redeeming the land by paying the paltry sum required for that purpose, nor attempting to avoid the sale. Equity favors vigilance, and will not encourage the litigious inclinations of individuals. Stoker must be ready to do equity when he invokes it in his behalf, and we feel not only justified but required, under all the circumstances in this case, to grant the relief prayed, upon terms equitable in themselves, etc. The decree is reversed, and the cause remanded with directions to set aside the sale," etc.

There was no such delay in this case as there was in the case cited, where a redemption was allowed; but the delay of the complainant is not without explanation. He testified that he had a conversation with Lurton in November, 1887, and that he told him he would pay the debt as soon as he got work. He said, "All right," and drove off. "I did not then know that the property had been sold. I went to Missouri in March, 1888, and came back in January, 1889. I first heard of the sale in December, 1888, in St. Louis. I had been gone since March, 1888. I saw him soon after my return, and told him I thought he had taken an advantage of me, and I was willing to pay him for his trouble. He said he could do nothing, as his wife had the deed. I asked him to see her, if she would do something. He turned and walked away. I offered to pay him for his trouble, and all that he had on it. He said he would see about it, he could do nothing, and walked away, and that was the last I saw of him." This was denied by Lurton, but both parties testified in person before the court, and the court had an opportunity to see the witnesses and judge of their relative credibility, and we will presume from the findings in the decree that the court gave credit to complainant's testimony on this question. If the facts were as testified by the complainant, there was no such delay as would preclude a recovery. As respects Mrs. Lurton, it sufficiently appears from the evidence that she took title to the premises in question from her husband, with notice of the irregularities in the proceedings and of complainant's rights, and we are of

opinion that the right of redemption was properly decreed as against her.

The decree of the circuit court will be affirmed.

EXECUTION SALES — INADEQUACY OF PRICE — SETTING ASIDE. — While gross inadequacy of price alone is not sufficient to avoid a sale under judicial process, it will, when conjoined with any irregularity or slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interference: *Smith v. Huntoon*, 134 Ill. 24; 23 Am. St. Rep. 646; *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792, and note; *Swires v. Brotherline*, 41 Pa. St. 135; 80 Am. Dec. 601, and note; *Blight v. Tobin*, 7 T. B. Mon. 612; 18 Am. Dec. 219; *Nesbitt v. Dallam*, 7 Gill & J. 494; 28 Am. Dec. 236. See also *Smith v. Perkins*, 81 Tex. 152; 26 Am. St. Rep. 794.

EXECUTION — SALES EN MASSE — SETTING ASIDE. — An execution sale of property *en masse* will not be set aside unless it is shown that a larger sum would have been realized had the property been sold in parcels or that the sale of a part of the property would have satisfied the execution: *Hudepohl v. Liberty Hill Water etc. Co.*, 94 Cal. 588; 28 Am. St. Rep. 149, and note with cases collected discussing the subject of execution sales *en masse*. A sale under execution of a quarter-section of wild land made at a great sacrifice will not be set aside for the sole reason that it was not divided and sold in parcels: *Greenup v. Stoker*, 12 Ill. 24; 52 Am. Dec. 474, and note.

EXECUTION SALES — SETTING ASIDE — LIMITATION. — Relief granted by courts of equity in avoiding execution sales on the ground of fraud is not limited to the period provided by statute within which courts of law may correct abuses of its process: *Blight v. Tobin*, 7 T. B. Mon. 612; 18 Am. Dec. 219.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY Co. v. BODEMER.

[139 ILLINOIS, 596.]

RAILROADS — DUTY TO TRESPASSERS. — When a trespasser upon the track of a railroad, or attempting to cross the track at a place other than a public crossing, is injured by a train, the company is not liable, unless the injury was wantonly and willfully inflicted, or was the result of such gross negligence as evidences willfulness.

RAILROADS — DUTY TO TRESPASSER AND LIABILITY FOR INJURY TO. — It is the duty of a railroad engineer to exercise ordinary care to avoid striking a trespasser upon the track. If the engineer sees the trespasser and waits until a warning by sounding the whistle can do no good, when by whistling sooner he could have enabled him to escape, the company is liable for the injury inflicted.

RAILROADS — GROSS NEGLIGENCE TOWARD TRESPASSER — WHAT IS. — Such negligence as evidences willfulness by a railroad company toward a trespasser upon its track manifests such gross want of care and regard for his rights as to justify the presumption of wantonness and a willingness to inflict injury, regardless of consequences.

RAILROADS — CONTRIBUTORY NEGLIGENCE — LIABILITY FOR INJURY TO TRESPASSER. — When a trespasser injured upon a railroad track has been

guilty of contributory negligence, the company is still liable, if by the exercise of ordinary care, it could have prevented the accident after discovering the danger in which the injured party stood, or if it failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the peril and averted the calamity.

RAILROADS — CONTRIBUTORY NEGLIGENCE BY TRESPASSER WHEN DOES NOT BAR RECOVERY. — Contributory negligence by a trespasser injured upon a railroad track by being struck by an engine cannot be relied upon as a defense in any case where the action of the company or its servants in the premises is wanton, willful, and reckless. In such case the party injured is entitled to recover, if the company could have avoided committing the injury by the exercise of ordinary care.

RAILROADS — GROSS NEGLIGENCE TOWARD TRESPASSER, WHAT IS. — When a railroad train which strikes and injures a trespasser upon the track is running at unusual speed in a crowded city over street crossings, upon unguarded tracks so connected with a public street and so apparently a continuation thereof as to be regarded by ordinary citizens as located in a public street, along a portion of tracks where persons were known to be passing and crossing every day, in conceded violation of a city ordinance as to speed and without warning of the approach of the train by ringing the bell, this conduct tends to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness, and to show that, if there was a failure to discover the danger of the injured party, such failure was owing to the recklessness of the company's servants in the management of the train.

RAILROADS — LICENSE TO USE RIGHT OF WAY — LIABILITY FOR INJURY TO FOOTMEN. — The mere passive permission of footmen to cross the right of way of a railroad company does not impose upon it the duty to provide against dangers to which they may thereby be exposed; yet, if the company directly or by implication induces persons to enter upon and pass over its right of way, it thereby guarantees that the way is in a safe condition suitable for such use, and for a breach of this guaranty it is liable in damages to a person injured thereby.

RAILROADS — GROSS NEGLIGENCE OF TOWARD TRESPASSER. — When an engineer upon a railroad train, knowing that persons are accustomed to cross a track between the streets of a large and crowded city, drives his engine forward recklessly and with indifference as to whether such persons are injured or not, and at a rate of speed greatly in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he is a trespasser, will be regarded as the result of such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

CONTRIBUTORY NEGLIGENCE ON PART OF PLAINTIFF CAN NEVER BE SET UP as an excuse for wanton and willful negligence on the part of the defendant.

INSTRUCTIONS WHEN PROPERLY REFUSED. — Instructions which assume a fact about which there is a controversy and which single out and give undue prominence to a single circumstance as characterizing the conduct of a party instead of leaving it to the jury to pass upon such conduct on a view of all the facts and circumstances in the case, are properly refused.

ACTION by an administrator to recover for the death of his intestate, who was killed through the alleged negligence of the

appellant railroad company while trying to cross its tracks in the city of Chicago. Judgment for plaintiff for three thousand dollars, and the railroad company appealed.

Pliny B. Smith, for the appellant.

Joseph S. Kennard, and *Brandt and Hoffman*, for the appellee.

MAGRUDER, C. J. It is assigned as error that the trial court refused, at the conclusion of the testimony on both sides, to instruct the jury, as then requested by the defendant, to find for the defendant. The position of the appellant is, that the deceased was a trespasser upon its right of way, attempting to cross the tracks where there was no public crossing. It has been held that where a trespasser upon the tracks of a railroad company is injured, the company is not liable, unless the injury was wantonly or willfully inflicted, or was the result of such gross negligence as evidences willfulness. By withdrawing the first, second, third, and fourth counts from the consideration of the jury and submitting the case upon the fifth count, the court assumed that the deceased was a trespasser at the time of his death, and required the jury to find that the injury was inflicted wantonly and willfully, or with such gross negligence as showed willfulness.

The evidence of the plaintiff tended to show that there were public street crossings over appellant's tracks at Twenty-sixth, Twenty-fifth, and Twenty-fourth streets; that the passenger train which struck the deceased was traveling at the rate of from thirty to thirty-five or forty miles an hour; that there were no gates where Twenty-sixth Street crossed the tracks; that the tracks were laid upon what was called Clark Street, running directly south from Twenty-second Street; that there were two roadways along the east and west sides of the tracks; that there were no fences between these roadways and the tracks; that the public drove along these roadways, running north and south, with wagons, and people passed up and down upon them; that wagons drive up to the tracks upon these roadways between Twenty-sixth and Twenty-fifth streets, and unload the cars, standing there, on the tracks; that "the wagons do not drive in there between the tracks except when they are unloaded"; that there are houses on the east side of the tracks; that upon the west side of the tracks, fronting upon the strip of ground called Clark Street and consisting of the two roadways and

the tracks between them, are a saloon, a rag shop, carpet shop, stone yard, packing house, and ice house, all located between Twenty-sixth and Twenty-fifth streets; that many people pass there, going across the tracks to the rag shop and packing house every day; that no bell was rung on the engine of the passenger train which killed the deceased; that a whistle was blown twice, giving two short, sharp sounds, when the engine of the passenger train was about five or ten feet from the deceased, or, as some of the witnesses express it, that the deceased was struck at the same time when the whistle was blown; that the deceased, when struck, was thrown into the air several feet; that the engine which struck him did not stop until it reached Twenty-fourth Street, about two blocks north of the place of the accident; that three boys, who were on an empty freight-car standing on the tracks about a car's length south of Twenty-fifth Street, witnessed the killing of the deceased, and one of them saw him on the track before he was struck.

We are unable to say that there was not evidence enough to justify the court in leaving it to the jury to say whether or not the boy was killed by the wanton and willful negligence of the company. The company introduced no evidence whatever to contradict the testimony of the plaintiff, except for the purpose of showing that the strip of land occupied by its tracks between Twenty-fifth and Twenty-sixth streets was its private right of way, and not a public street. In answer to written questions calling for special findings, submitted at defendant's request, the jury found that the tracks were straight for a considerable distance toward the south from the place of the accident; that a locomotive approaching that place from the south could be seen at a distance of 1000 feet; that the deceased did not step from behind the freight train immediately in front of the engine of the passenger train, but that he was about 125 feet from the engine when he stepped upon the track. The jury answered, "We cannot say," to the question, "Did the engineer have time to stop his train after seeing deceased and before striking him?"

It was the duty of the engineer to exercise ordinary care to avoid striking the deceased, even if he was a trespasser. If it was impossible to stop the train in time, it may yet have been possible to have warned the plaintiff of his danger in time to enable him to get out of the way. The engineer "must use all the usual signals to warn the trespasser of danger": 2

Shearman and Redfield on Negligence, 4th ed., sec. 483. If the boy was 125 feet from the engine when he stepped upon the track, did the engineer see him? It was for the jury to answer this question. The company did not produce the engineer to say that he did not see the deceased, nor did it introduce any evidence upon that subject. It is not necessary to show by affirmative testimony that the engineer's look was directed toward the boy. It is sufficient, if it appear from all the circumstances, that he might have seen him by the exercise of reasonable diligence and ordinary prudence. Why did he not see him? The track was straight and clear and unobstructed for a long distance. Others saw him. The boys on the freight car were distant more than 125 feet, and one of them saw the deceased "standing . . . on the track, right between the rails, not quite in the middle."

If the engineer saw the boy when he was at a distance of 125 feet, did he give him the signal of danger as soon as he ought to have given it? One witness, standing on Twenty-sixth Street and waiting for the freight train to pass, swears that he heard the whistle blow at the crossing; his testimony tends to show, however, that the engine had passed Twenty-sixth Street before the whistle blew, and how far it had passed does not appear; but three witnesses swear that when the whistle sounded the engine was near enough to strike the boy, or only five or ten feet from him. It was for the jury to weigh this evidence and consider its bearing. If they believed from the evidence that the engineer saw the boy, and thereafter waited until the sound of the whistle could do no good, when, by whistling as soon as the deceased came upon the track, he could have warned him in time to enable him to escape, they were justified in finding for the plaintiff.

The jury were authorized to look at the conduct of the engineer in the light of all the facts in the case. It has been said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement": 2 Thompson on Negligence, 1264, sec. 53. In *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, we said that where a trespasser is injured the railroad company is liable for "such gross negligence as evidences willfulness." We said the same thing in *Blanchard v. Lake Shore etc. R. R. Co.*, 126 Ill. 416; 9 Am. St. Rep. 630.

What is meant by "such gross negligence as evidences willfulness"? It is "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness": 2 Thompson on Negligence, 1264, sec. 52. It is such gross negligence as to imply a disregard of consequences, or a willingness to inflict injury: Deering's Law of Negligence, sec. 29. In *Harlan v. St. Louis etc. R'y Co.*, 65 Mo. 22, it was said: "When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity." Contributory negligence, such as that of a trespasser upon a railroad track, cannot be relied on "in any case where the action of the defendant is wanton, willful, or reckless in the premises, and injury ensues as the result": *Bouwmeester v. Grand Rapids etc. R. R. Co.*, 63 Mich. 557; *Central R. R. Co. v. Denson*, 84 Ga. 774. "Under the rule conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line it can be held liable only for an act which is wanton, or for gross negligence in the management of its line which is equivalent to intentional mischief": 1 Thompson on Negligence, 449. Although the plaintiff is guilty of negligence, he can recover, if the defendant could have avoided committing the injury by the exercise of ordinary care: Deering's Law of Negligence, sec. 31.

Let these principles be applied to the facts of the case at bar. The train which committed the injury was traveling at the unusual speed of thirty-five or forty miles an hour in the crowded city of Chicago; over street crossings; upon unguarded tracks, so connected with a public street and so apparently the continuation of a public street as to be regarded by ordinary citizens as located in a public street; along a portion of such tracks where persons were known to be passing and crossing every day; in conceded violation of a city ordinance as to speed; and without warning of the approach of the train by the ringing of a bell. This conduct tended to show such a gross want of care and regard for the rights of others

as to justify the presumption of willfulness. It also tended to show that if there was failure to discover the danger of the deceased, such failure was owing to the recklessness of the company's servants in the management of its train.

We are of the opinion that the court committed no error in refusing to instruct the jury to find for the defendant: *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *Indianapolis etc. R. R. Co. v. Galbreath*, 63 Ill. 436.

Appellant assigns as error the admission of testimony, that persons were in the habit of passing across the tracks at the place where the accident occurred. In cases where persons have traveled along a railroad right of way as a mere foot-path, using it for their own convenience, and where there was no evidence of any assent of the railroad company thereto except its non-interference with the practice, it has been held that such persons are to be regarded as wrong-doers and trespassers, and that a mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident: *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Blanchard v. Lake Shore etc. R. R. Co.*, 126 Ill. 416; 9 Am. Rep. 630; *Illinois Cent. R. R. Co. v. Hetherington*, 83 Ill. 510; but in each of such cases it was conceded that the place where the injury occurred was upon the right of way of the railroad company, and that the party making use of such right of way knew it to be the exclusive property of the railroad company for the purpose of running its trains. But, in the case at bar, the testimony of the plaintiff tended to show that the tracks, at the point where the deceased was killed, were laid in Clark Street, a public street of the city of Chicago. There were traveled roadways constantly in use on both sides of the tracks, and several witnesses testified that the strip of land which embraced the tracks in the middle and the roadways on the sides was called Clark Street, and regarded as a public street.

When the evidence on the part of the plaintiff had closed, the defendant introduced proofs tending to show that the strip in question is 120 feet wide; that 100 feet in the middle of the strip, where the tracks were laid, was railroad right of way, but that ten feet on each side of said 100 feet belonged to the public and were used by the public. The strip in question was used partly by the public and partly by the railroad company. The proof also tended to show that for years the rail-

road tracks had been laid in Clark Street as far south as Twenty-second Street, though they had subsequently been moved somewhat to the westward. The course of the tracks southward was such as to appear to be a mere extension of Clark Street. There was no fence, or other mark of separation, to designate what portion of the strip, 120 feet wide, belonged to the public and what portion belonged to the railroad. There was proof tending to show, that, before any tracks were laid at all, there had been a foot-path in use from Twenty-second Street as far south as Twenty-fifth Street. As has already been stated, it also appeared that persons were allowed to come up to cars standing upon these tracks for the purpose of loading and unloading their wagons; and one witness stated that wagons drove upon or between the tracks for such purpose.

The books draw a distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate and cases where the owner or occupant holds out any enticement, allurements, or inducement to persons to enter upon or pass over his property: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644. "A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly, or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use; and for a breach of this obligation he is liable in damages to a person injured thereby": *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644. Though it is unnecessary to go so far as to hold, in this case, that the facts hereinbefore recited amounted to an implied inducement on the part of the railroad company to the public to pass over its tracks, it is nevertheless quite manifest that the surroundings were such as to give to the tracks the appearance of being located in a public street; and all the circumstances of the situation were such as to lead those who had occasion to frequent that neighborhood to believe that the tracks were in a public street. Hence, we are inclined to the opinion that the court did not err in admitting proof of the passing of persons across the tracks, for the reason that such proof was admitted before the defendant proved that the tracks were on its right of way, and while as yet the evidence of the plaintiff tended to show, in the absence of contradictory proof, that the tracks were in a public street, or

what was called and regarded as a public street. If the tracks were in a public street, the company was unquestionably under obligations to "provide against the danger of accident" to those rightfully thereon. After the defendant introduced its proof it did not move to exclude the particular testimony of the plaintiff as to the passing of persons over the tracks. Whether, therefore, after the ownership of the company had been shown, persons who had been proven to be in the habit of crossing the tracks under the belief that they were crossing a public street were or were not such wrongdoers as to relieve the company from liability for injury to them is a question which need not be further considered.

The appellant further objects that the court should have excluded the ordinances as to the speed and the ringing of a bell, as these ordinances are not described in the fifth count of the declaration: *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112. The ordinance as to speed was described in the third count, and the ordinance as to the ringing of the bell was described in the fourth count, and they were properly admitted under these counts at the time when they were admitted. After defendant introduced its proof, it made no formal motion to exclude the ordinances, though it objected to the reading of them to the jury in the argument of plaintiff's counsel, and asked the court to instruct the jury to disregard them as evidence. We do not think that the action of the court in this particular, even if it be regarded as technically erroneous, could have done the defendant any harm, for the reason that counsel for defendant admitted, in his opening statement to the jury, that the city ordinance prohibited the running of trains in the city at a greater rate of speed than ten miles an hour, and also admitted that the train which killed the deceased was traveling at a greater rate of speed than ten miles an hour; and for the further reason that the ordinance as to the ringing of a bell was not read at all in the hearing of the jury, and counsel for defendant allowed testimony that no bell was rung to be admitted without objection.

Furthermore, the action of the court in withdrawing from the consideration of the jury all the counts except the fifth was exceedingly favorable to the defendant. We do not think that the jury ought to have been told that there could be no recovery under the third count, which described the ordinance as to speed.

Even if it be admitted that the deceased was a trespasser, the third count was sufficient to authorize the proof under it of such gross negligence as evidences willfulness. The word "reckless," implies heedlessness and indifference. If an engineer, knowing that persons are accustomed to cross a track between the streets of a large and crowded city drives his engine forward "recklessly," that is to say, with indifference as to whether such persons are injured or not, and at a rate of speed "greatly" in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness."

The views already expressed dispose of appellant's objections to the refusal of instructions numbered 3, 4, 5, and 8 asked by the defendant. Refused instruction No. 7 was not based upon the evidence. It submitted to the jury the question whether or not the deceased was using the tracks as a playground. We find no evidence in the record tending in the slightest degree to show that the tracks were used for any such purpose. Refused instructions numbered 9, 10, 11, 12, 15, and 17 merely related to the degree of care which the deceased was required to exercise, but, as the case was submitted to the jury upon a declaration which charged wanton and willful negligence, it made no difference to what extent the deceased was guilty of a want of care. Contributory negligence on the part of the plaintiff is no excuse for wanton and willful negligence on the part of the defendant. Refused instructions numbered 24 and 25 assumed the existence of facts about which there was a controversy, and each singled out and gave due prominence to a single circumstance as characterizing the defendant's conduct, instead of leaving it to the jury to pass upon such conduct upon a view of all the facts and circumstances in the case.

The judgment of the appellate court is affirmed.

CRAIG and BAILEY, JJ., dissenting.

RAILROADS — DUTY TO TRESPASSERS ON TRACK: See *Central R. R. etc. Co. v. Vaughn*, 93 Ala. 209; 30 Am. St. Rep. 50, and extended note with cases collected discussing the subject.

WATERMAN v. CHICAGO AND IOWA RAILROAD CO.

[139 ILLINOIS, 658.]

OFFICER DE FACTO IS ONE WHO IS IN ACTUAL POSSESSION of an office under claim and color of an election or appointment, and is in the exercise of its functions and the discharge of its duties. He must hold office under some degree of notoriety, and must exercise continuous acts of an official character.

OFFICER DE FACTO, WHO IS NOT. — When a board of directors of a railroad corporation which is neither a *de jure* nor a *de facto* board, because elected at a time and place other than that fixed by the by-laws, without notice to or the presence of a minority of the *de jure* directors, and without the possession of the records, papers, or seal of the corporation, and whose right of office has been disputed as having no possession of the corporate property or of its management, and against whom litigation exists, to oust them from office, appoints one of their number president of the corporation, such appointee is neither a *de jure* nor a *de facto* officer, notwithstanding a majority of the directors present at the meeting were the *de jure* directors of the corporation holding over after the expiration of their term of office.

CORPORATIONS — EFFECT OF IRREGULAR MEETING OF DIRECTORS. — The presence of a bare majority or quorum of the lawful directors of a corporation at a special meeting, held at a place other than that designated for regular meetings of the board, and without notification to or the presence of the remaining lawful directors, as required by the by-laws for a special meeting, does not render the act of such quorum effectual to bind the corporation and its stockholders.

JUDGMENTS IN QUO WARRANTO — CONCLUSIVENESS OF. — A judgment in an action in the nature of *quo warranto* ousting certain persons from the office of directors of a corporation on the ground of the illegality of their election is conclusive evidence against them on this point in another action.

OFFICER DE FACTO — WHO IS NOT — SALARY. — When the board of directors of a corporation which is neither a *de jure* nor a *de facto* board appoints one of their number president of the corporation, he is neither a *de jure* nor a *de facto* officer, and is not entitled to recover any compensation for his services as such president.

OFFICER DE FACTO — LIABILITY FOR SALARY RECEIVED. — When an officer *de facto* has received the salary, fees, and emoluments of an office, he is liable therefor to the officer *de jure* in an action for money had and received.

OFFICER DE FACTO — ACTION FOR SALARY INVOLVES TITLE TO OFFICE. — When a person claiming to be an officer brings suit for the salary or compensation belonging to such office, his title to the office is in issue, and if another has the real right to the office, although not the possession, the plaintiff cannot recover.

OFFICER DE FACTO AND DE JURE — ACTION FOR SALARY INVOLVES TITLE TO OFFICE. — When a person claiming to be an officer of a public or private corporation brings an action at law to recover the salary incident to that office, which he has no right to receive unless he has a legal right to the office, he necessarily puts his title to the office in issue, and must prove himself to be a *de jure* officer. A certificate of election, commission, or other evidence, may be, under some circumstances, *prima facie* or even conclusive evidence of a *de jure* right.

Charles Wheaton, for the plaintiff in error.

M. D. Hathaway, for the defendant in error.

BAKER, J. In this action of *assumpsit*, Waterman, plaintiff in error, seeks to recover from the Chicago and Iowa Railroad Company, defendant in error, his salary as president of said corporation for a period of about two years, at the rate of five thousand dollars per annum. The issues were tried in the circuit court before the judge and without a jury, and the questions of law and mixed questions of law and fact involved in the controversy were amply preserved by exceptions to the rulings made on the various propositions submitted. The judgments of the circuit and appellate courts were against Waterman, and he brought the record here by this writ of error.

At the annual meeting of the stockholders of the railroad company, held in March, 1879, Joseph Reising, Daniel B. Waterman, George W. Kretzinger, B. T. Lewis, F. E. Hinckley, P. B. Shumway, and Joseph K. Barry were elected directors of the corporation, and said directors elected F. E. Hinckley president of the company, and also elected a vice-president and secretary. On January 3, 1880, Lewis resigned his office of director, and R. G. Montony was appointed a director in his place and stead. The by-laws of the company provided for an annual meeting of its stockholders, to be held at the office of the company, in the city of Chicago, Illinois, on the first Wednesday in March, in each year, and for an election by them at that time of a board of seven directors, who were to hold office until the next annual election and until their successors were elected. On Wednesday, the third day of March, 1880, various persons met at said office for the purpose of holding said annual meeting, and among them were Hinckley, the president, and all of the directors. Immediately before a meeting was organized an injunction was served, which restrained the voting of certain stock. Thereupon Reising and Montony organized and held what purported to be the annual meeting of the stockholders. They were neither of them stockholders, and neither of them had proxies to vote any stock. The town of Aurora was the owner of 1000 shares of the capital stock of the corporation, and Joseph Reising, supervisor of the town, voted 993 of said shares for Daniel B. Waterman, Joseph Reising, R. G. Montony, L. D. Brady, E. R. Allen, Holmes Miller, and William

McMicken for directors, and they, receiving all the votes cast, were declared elected.

The by-laws provided that the directors elected at the annual meeting should, at their first meeting thereafter, to be called as soon as might be and as soon as a quorum could be convened, proceed to organize the board by the election of a president, vice-president, and secretary of the company, to hold office during the pleasure of the board, and that the board of directors should have authority to fill all vacancies that should occur therein, occasioned by death, resignation, or otherwise. They also provided: "Regular meetings of the board of directors shall be held at the office of the company, in the city of Chicago, on the first Thursday of every month, at ten o'clock in the forenoon."

On the fourth day of March, 1880, — which was the first Thursday in that month, — the seven directors who had been elected, as above stated, on the preceding day, met "at the office of R. G. Montony, at 97 Clark Street, in room 27," and at that meeting McMicken resigned the office of director, and George W. Kretzinger was elected to fill his place. Thereupon said directors, they all being present, elected Waterman president of the company, and also elected a secretary and a treasurer, and an executive committee. Several motions in regard to the business affairs of the company were also made and carried at that meeting. Said directors also held meetings on March 19, April 23, May 28, and June 21, 1880, and on several subsequent days, at which meetings considerable business was done, such as adopting motions and resolutions, appointing officers and attorneys, ordering the payment of various sums of money to various persons, etc.

At the time of said elections in 1880, the railroad of defendant in error was in the hands of and operated by a receiver appointed by the circuit court of the United States for the northern district of Illinois in a foreclosure suit, but a petition was pending in said court which claimed that the company was entitled to have the road turned over to it. On June 19, 1880, the receiver, in conformity with an order of the court, surrendered the road to the company by delivering it to Waterman, Montony, Reising, and Kretzinger, who were a majority of the board of directors, whether the elections of 1880 be regarded or not. Four days thereafter, on June 23, 1880, the road was again placed in the hands of a receiver, and remained in the hands of a receiver, and was operated by him, until

after F. H. Head was elected president of the company in 1882.

On March 28, 1880, an information in the nature of a *quo warranto*, on the relation of Hinckley, Shumway, and Barry, who had been elected directors in 1879, was filed in the criminal court of Cook County, against Reising, Waterman, Montony, Kretzinger, Brady, Allen, and Miller, and on the nineteenth day of March, 1881, a final judgment was rendered in said suit, wherein it was "ordered and adjudged by the court that Montony, Waterman, Reising, Kretzinger, Brady, Miller, and Allen be and they are ousted from the office of directors of the Chicago and Iowa Railroad Company, and from exercising any of the privileges, functions, and franchises of the office of directors under the election for directors of said company alleged to have been held on the first Wednesday of March, A. D. 1880; but this judgment does not in any manner affect the rights of defendants acquired under the election for directors in March, 1879." The substance and meaning of this final judgment is, that Allen, Miller and Brady are absolutely ousted from their offices of directors of the railroad company, but that Montony, Waterman, Reising and Kretzinger are merely ousted from exercising any privileges, functions, and franchises of directors by virtue of the election of March, 1880, and are left clothed with whatever rights they may have acquired prior thereto.

At the meeting held on May 28, 1880, by the seven persons alleged to have been elected directors on the third day of that month, a motion fixing the salary of the president of the company at five thousand dollars per year was adopted. Plaintiff in error claimed to be president of defendant in error, and performed some acts as such, until one F. H. Head was elected president on the fifteenth day of March, 1882. During the whole of said time Hinckley also claimed to be president of the company by virtue of his election in 1879, and also performed some acts as such.

One of the contentions of plaintiff in error is, that the election of March 3, 1880, was a valid election, and that by means thereof Waterman, Reising, Montony, Brady, Allen, Miller, and Kretzinger became and were the lawful and rightful directors of the corporation. It is a sufficient answer to this claim to say that it was decided otherwise in the *quo warranto* suit, and that plaintiff in error was a party to the judgment rendered therein, and is bound thereby.

It is claimed that, at all events, each and every one of the persons last named came into office under color of an election, and was therefore a director *de facto*, and the board, at the least, a *de facto* board of directors when it elected Waterman president; and it is also claimed in that behalf, that the appointment or election of an officer by a *de facto* officer or by *de facto* officers is a valid appointment or election, and constitutes the person so appointed or elected a *de jure* officer. The charter of the railroad company provides for the "election of a board of directors for the management of the business of the company." The by-laws provide for the election of "a board of seven directors"; that "the directors so elected shall, at their first meeting thereafter, to be called as soon as may be and as soon as a quorum can be convened, proceed to organize the board by the election of a president, vice-president, and secretary of the company"; that "the board of directors shall have authority to fill all vacancies that may occur therein, and that four directors shall constitute a quorum for the transaction of business. They also provide for regular meetings of the board of directors, and for special meetings to be called by the president or by any three members of the board, "allowing for due notification of the members, not less than two days." The expression "organize the board," etc., means simply that the board or body shall elect the designated officers. Said expression, and the expression "at their first meeting thereafter, to be called," and the other provisions of the by-laws above stated, clearly indicate that the president is to be elected by the board of directors acting as a body, and at a meeting of such board of directors. In 1 Beach on Private Corporations, sec. 224, it is said: "Even a majority of the directors, or all of them, acting separately, cannot bind the corporation in regard to matters which they are only authorized to act upon as a board"; and so the question arises whether or not the persons alleged to have been elected directors on March 3, 1880, were, when they assumed to elect plaintiff in error president of the company, a *de facto* board of directors, within the meaning of the rule which, under some circumstances, validates the acts of *de facto* officers.

A *de facto* officer is distinguished on the one hand from a mere usurper of an office, and on the other hand from an officer *de jure*. He is one who is in actual possession of an office under the claim and color of an election or appointment, and is in the exercise of its functions and in the discharge of its duties.

In Angell and Ames on Corporations, sec. 287, it is said: "The best definition we have seen of an officer *de facto* is that given by Lord Ellenborough in *King v. Corporation of Bedford Level*, 6 East, 368." That definition is this: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." In *Vaccari v. Maxwell*, 3 Blatchf. 368, the court says: "We think, however, that the decisions in relation to the acts of officers *de facto* are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in the possession of a place which has the character of a public office." In *State v. Curtis*, 9 Nev. 325, it is said: "In order to make a person an officer *de facto*, the law requires that he should in some way be put into the office, and that he should also have secured such a holding thereof as to be considered really in peaceable possession and actually exercising the functions of an officer."

On March 3, 1880, there were in the directory of the railroad company two antagonistic factions, each contending for the control of the corporation and the possession and management of its property. Hinckley, Shumway, and Barry, members of the board elected in 1879, did not acquiesce in the election held on March 3d, but immediately, and on the same day, consulted counsel and took steps to contest its validity, and claimed that they were still members of the board of directors, and that the board of 1879 was the lawful and actual board of directors of the company, and, as we have heretofore seen, these contentions were afterward judicially determined in their favor. The next day, Thursday, March 4, 1880, was the day fixed by the by-laws for the regular meeting of the board of directors, and the by-laws provided that it should be held at the office of the company, in Chicago. The board which claimed under the election of March 3d met on said next day, but at the offices of Montony instead of the office of the company. Montony, Reising, Waterman, and Kretzinger, four of the *de jure* directors of the company, were present at said meeting, and they constituted a quorum of the *de jure* board; but the meeting was not at the place fixed for regular meetings, and the other three *de jure* directors were not present, and were not notified of the time and place of such meeting. On the contrary, they were completely ignored, and the four directors above named met and acted with Brady, Allen, and Miller.

The supposed board that thus met did not have possession or control of either the seal, the record books, or the papers of the corporation. It did not have possession or control of its property, or control of the management of its railroad. Prior to the time it so met it had not exercised any functions or performed any acts incident to a board of directors. It did not meet in or have possession of the place which had the character and reputation of being the office of the company. It assumed to be the board of directors, but its claim was disputed by others who claimed to be directors, and it was not recognized by those who up to that date had been the president, vice-president, secretary, and a majority of the executive committee of the corporation. It is impossible, then, that said board, elected only the day before, could have had the reputation of being the board of directors it assumed to be. The only official acts it claims to have performed prior to the election of president, was to accept the resignation of McMicken as director and appoint Kretzinger to fill the vacancy, and these were done at the same meeting with and immediately preceding such election. We do not regard them as of any significance as bearing upon the question of reputation or notoriety. Afterward, and at the same meeting, said board appointed other officers and adopted various motions, and at subsequent meetings it adopted various other motions and resolutions, and procured a new seal and a new record book, and caused its proceedings to be recorded therein, and appointed attorneys, and did various acts of like character. These matters are unimportant so far as regards any contention that the election was binding on the corporation, on the ground that said board, when they made the election, had the reputation of being the board of directors of defendant in error. There should have been some evidences of prior acts of the board: *State v. Curtis*, 9 Nev. 325; *State v. Wilson*, 7 N. H. 543. It cannot fairly be said that the board which elected plaintiff in error president had such possession and control of the affairs of the company as that it could be regarded to be in the peaceable and actual exercise of the functions of a board of directors. Nor does the mere fact of the presence of a bare majority or quorum of the lawful directors at a casual meeting held at a place other than that designated for regular meetings of the board, and without the notification to the other rightful directors required by the by-laws for a special meeting, render the

act of such quorum effectual to bind the company and its stockholders.

It is manifest from the holdings of the trial court upon the propositions submitted to it that it ruled that under the circumstances of the case the supposed board of directors which assumed to elect plaintiff in error president of the railroad company was not, when it made such election, a *de facto* board of directors, within the meaning of the rule which validates some acts of *de facto* officers. In our opinion there was no error in such ruling. Since the board of directors which elected plaintiff in error president was neither a *de jure* nor a *de facto* board of directors, it follows that plaintiff in error never became or was the rightful president of the railroad company.

At the trial the court held, "that the plaintiff, to maintain his action for salary as president, must show that he was such officer *de jure* as well as *de facto*." It is the legal right to an office that confers the right to receive and appropriate the salary, fees, and emoluments incident to such office, and if an officer *de facto* has obtained such salary, fees, or emoluments, he is liable to the officer *de jure* in an action for money had and received: *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; and if suit be brought by a person claiming to be an officer, for the salary or compensation belonging to such office, his title to the office is in issue, and if that be defective and another has the real right, although not in possession, the plaintiff cannot recover: *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *Matthews v. Supervisors*, 53 Miss. 715; 24 Am. Rep. 715; *People v. Smyth*, 28 Cal. 21; *Andrews v. Portland*, 79 Me. 484; 10 Am. St. Rep. 280; *McCue v. County of Wapello*, 56 Iowa, 698; 41 Am. Rep. 134; *Comstock v. Grand Rapids*, 40 Mich. 397, and numerous other authorities. Whatever may be the rule in certain *mandamus* proceedings, and in suits in chancery in regard to questioning therein, collaterally, the title of *de facto* officers, we think that when a person brings an action at law against a county, municipality, or private corporation, for the recovery of a salary incident to a particular office, and which he has no legal right to receive unless he has a legal right to the possession of such office, he necessarily puts his title to the office in issue. However, a certificate of election, commission, or other evidence may be, under some circumstances, *prima facie* or even conclusive evidence of a *de jure* right.

In our opinion there was no error in the holding of the court

now under consideration. Even if there was, it worked no injury to plaintiff in error, for if the supposed board of directors which assumed to appoint him president was neither a *de jure* nor a *de facto* board of directors, then he was without even color of election, and was, at most, a mere intruder into the office of president.

We find no substantial error in the record. The judgment of the appellate court is affirmed.

CORPORATIONS. — NOTICE OF MEETING OF DIRECTORS — NECESSITY FOR: See *Bank v. McCarthy*, 55 Ark. 473; 29 Am. St. Rep. 60, and note. Acts done at a corporation meeting of which notice was not given in the prescribed manner are void: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99, and extended note.

OFFICERS DE FACTO — WHO ARE. — To constitute a person an officer *de facto* there must be at least some colorable election or induction into office: *State v. Taylor*, 108 N. C. 196; 23 Am. St. Rep. 51, and note; *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note; *Hamlin v. Kassaffer*, 15 Or. 456; 3 Am. St. Rep. 176, and note.

OFFICER DE FACTO — LIABILITY TO OFFICER DE JURE FOR SALARY. — A *de jure* officer who has been kept out of his office by an intruder may recover in an action on the case against such intruder all the profits of the office which he would have received had he exercised the office, less the necessary expenses of earning them: *Bier v. Gorrell*, 30 W. Va. 95; 8 Am. St. Rep. 17, and note; *Kessel v. Zeiser*, 102 N. Y. 114; 55 Am. Rep. 769. See also note to *Andrews v. Portland*, 10 Am. St. Rep. 284, 285.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE *v.* CRAIG.

[132 INDIANA, 54.]

OFFICE AND OFFICERS — CHANGE OF RESIDENCE OF OFFICER AS VACATION OF OFFICE.— When a statute provides that “no person shall hold the office of councilman unless, at the time of his election, he is a resident of the ward from which he is elected, and in the case of the removal of any councilman from the ward from which he was elected the common council shall have power to declare his office vacant and order a special election to fill the vacancy,” a councilman duly elected while a resident of one ward does not create a vacancy in the office by his subsequent removal to another ward, in the absence of any action taken by the city council in the matter.

R. H. Hartford, prosecuting attorney for the appellant.

F. H. Snyder and G. W. Bergman, for the appellee.

MCBRIDE, J. The appellee was duly elected councilman for the third ward of the city of Portland. He qualified and entered upon the duties of the office. He was, at that time, a resident of said ward, and was otherwise qualified. Afterward he removed from the third to the second ward, where he resided when this suit was commenced, which was a proceeding against him in the nature of *quo warranto*. Since his removal he has still assumed to be councilman for the third ward, and has been acting in that capacity. The only question we are required to decide is, Did his removal from the third ward vacate the office? The court below held that it did not.

The precise question has never heretofore been before this court. Indeed, no authority is cited, and counsel present the question as one of first impression.

The law providing for the incorporation of cities requires that the city shall be divided into wards, and that two councilmen shall be elected from each ward by the legal voters of their respective wards: Rev. Stats. 1881, sec. 3043. The section referred to contains the following provision: "No person shall hold the office of councilman unless, at the time of his election, he is a resident of the ward from which he is elected; and in case of the removal of any councilman from the ward from which he was elected, the common council shall have power to declare his office vacant, and order a special election to fill the vacancy."

It is conceded that the city council has never taken any action in the matter.

The only constitutional restriction upon the residence of officers of municipal corporations is found in section 6, article 6 of the constitution, which provides that "all county, township, and town officers shall reside within their respective counties, townships, and towns." The word "town" is generic, and includes cities: *Flinn v. State*, 24 Ind. 286.

It is, however, competent for the legislature to impose additional conditions and restrictions not in conflict with any express provision of the constitution. It may, without doubt, as is done in the statute now under consideration, prescribe that only those shall be eligible for election as councilmen who are at the time residents of the ward for which they are elected. We think it equally clear that it may provide that removal from that ward will of itself operate as a vacation of the office. We do not think, however, that it has done so. In our opinion, it has not only committed to the city council the power to declare a vacancy in such a case, but it has also left the exercise of that power to the discretion of the council. Until that body has acted, the mere fact of removal to another ward will not of itself have the effect to create a vacancy.

The law providing for the organization and election of boards of county commissioners provides for the division of counties into districts, and that a commissioner shall be elected from each district who shall reside in the district: Rev. Stats. 1881, sec. 5732.

In the case of *Smith v. State*, 24 Ind. 101, it was held that the statute did not require that a commissioner should continue to reside in the district for which he was elected.

It is true the statutes are unlike in this, that boards of county commissioners are elected by the vote of the entire

county, and not by the vote of the district which they represent, while members of the city council are elected by the votes alone of the voters of their respective wards; but when they are once elected and enter upon the discharge of their official duties, these duties are such as affect alike all portions of the city, and are in no sense local. As is said of the county commissioner in *Smith v. State*, 24 Ind. 101, when he assumes the duties of his office: "At that time he takes an oath of office, and assumes duties and a jurisdiction co-extensive with the limits of the county." So the member of the city council, when he takes his oath of office, assumes duties and a jurisdiction co-extensive with the limits of the city. He is not an officer of the ward, but an officer of the entire city.

Judgment affirmed.

OFFICERS — EFFECT OF CHANGE OF RESIDENCE. — The removal of a tax-collector from the town vacates his office: *Gage v. Dudley*, 64 N. H. 437. The appointment of a deputy sheriff after his removal from the county in which he was appointed is void: *Blair v. State*, 26 Tex. App. 387. The re-districting a county so as to include the town in which a county commissioner resides in a different district from that in which he was elected will not affect his right to his office: *Norwood v. Holden*, 45 Minn. 313. The clause of the constitution which provides that no person shall be eligible to any civil office unless he be a qualified elector for such office requires the qualifications as elector to exist at the time of the election, and not at the time of exercising the duties of the office: *State v. Lake*, 16 R. I. 511.

TERRE HAUTE AND LOGANSFORT RAILROAD COMPANY v. SHERWOOD.

[132 INDIANA, 129.]

PLEADING — DEMURRER WHEN SEVERAL. — A demurrer in the words, "Come now the defendants and demur severally to each paragraph of the complaint, because the same does not state facts sufficient to constitute a cause of action against defendants," must be regarded as a several demurrer addressed to each paragraph of the complaint.

PLEADING SPECIAL CONTRACT. — When a party declares upon a special contract he must state facts showing an actionable breach of that contract. He cannot recover upon any contract except that upon which he specially declares.

CARRIER OF GOODS UNDER SPECIAL CONTRACT — LIABILITY — BURDEN OF PROOF. — When a carrier has exclusive control of goods carried under a special contract limiting his liability, the shipper may make out his case by proving his contract and the non-delivery of the goods. The burden of proof is then upon the carrier to show that the injury or loss complained of is attributable to one of the causes or perils against which the contract secures immunity.

CARRIER OF LIVE-STOCK UNDER SPECIAL CONTRACT—BURDEN OF PROOF.—

When live-stock is shipped under special contract limiting the carrier's liability, and wherein the owner undertakes to go with and care for the stock during transportation, the burden of proof is on him to show, in the first instance, that the injury or loss complained of is not attributable to a failure to perform, or a negligent or improper performance of the acts which he undertook to perform, and he must also show that the injury was caused by the carrier's breach of duty under the contract.

CARRIERS—POWER TO LIMIT LIABILITY BY SPECIAL CONTRACT—BURDEN OF PROOF.— While a carrier cannot contract for exemption from his own fraud or negligence, he may, by special contract, limit his common-law liability, and when so limited there can be no recovery for loss or injury caused by one of the perils from which the contract effectively exempts him. The burden of proof is upon him to establish such exemption.

PRACTICE—ERROR IN OVERRULING DEMURRER, EFFECT OF.— When a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record proper that the judgment rests on the good paragraphs, a reversal must be adjudged.

CARRIER OF LIVE-STOCK UNDER SPECIAL CONTRACT—INSUFFICIENT EVIDENCE TO JUSTIFY RECOVERY.— When live-stock is transported under a special contract limiting the carrier's liability, and wherein the owner undertakes to go with and care for the stock during transportation, he cannot recover solely upon evidence of a failure to deliver; but he must also show that such failure was not due to his own negligence, but to a breach of duty on the part of the carrier.

J. G. Williams, H. Corbin, and C. Kellison, for the appellant.

O. M. Packard, C. P. Drummond, and A. C. Capron, for the appellees.

ELLIOTT, C. J. The demurrer of the appellant is clumsily drawn, and it is difficult to determine whether it shall be treated as addressed to the entire complaint or as addressed distributively to each paragraph of that pleading. It reads thus: "Come now the defendants and demur severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action against defendants." We regard the demurrer as a several one addressed to each paragraph of the complaint. The demurrer employs the term "severally," as directed against each paragraph, and the words "the same" must be regarded as referring to each paragraph, and not to the entire complaint. Our conclusion is supported by the cases of *Silvers v. Junction R. R. Co.*, 43 Ind. 435; *Stribling v. Brougher*, 79 Ind. 328; *Mitchell v. Stinson*, 80 Ind. 324; *Clodfelter v. Hulett*, 92 Ind. 426; *Indiana etc. R'y Co. v. Dailey*, 110 Ind. 75. The language employed in the demurrer before us is different from that used in

Baker v. Groves, 1 Ind. App. 522, and the cases are, therefore, to be discriminated. The case referred to goes quite as far as the authorities warrant, and we are not willing to extend its doctrine.

The first paragraph of the complaint contains these allegations: That the plaintiffs are partners; that as such they made a contract with the defendant, a common carrier, to transport eighty horses from East St. Louis, Illinois, to Plymouth, Indiana; that the plaintiffs delivered the horses to the defendant and paid the freight thereon as fixed by the contract; that the defendant "undertook to carry safely and securely for the plaintiffs"; that "the defendant did not carry and deliver the horses, but failed to do so, whereby they were wholly lost to the plaintiffs." The contracts under which the horses were shipped, three in number, were made part of the paragraph by reference, and appear in the record as exhibits. The contracts incorporated in the pleading are the same, except as to dates, numbers and amounts, so that it is only necessary to copy the material parts of one of the three instruments.

The parts deemed material by us read as follows: "Whereas, the Terre Haute and Indianapolis Railroad Company transport live-stock only at first-class rates, as per their merchandise tariff, unless said company be released from all claims for damages resulting from the causes hereinafter specified. Now, for the purpose of obtaining transportation of the live-stock hereinafter mentioned at the reduced rate granted by said company in consideration of being so released, this agreement made between said company, party of the first part, and Sherwood and Swoverland, parties of the second part, witnesseth, that, in consideration of being released from liability, as hereinafter specified, the said company agrees to transport one carload of horses from East St. Louis to Terre Haute, and forward the same from the last-named station to Plymouth, Indiana, via the Terre Haute and Logansport Railroad, and agrees that the through rate to Plymouth shall not exceed fifty-two dollars per car and advanced charges; and further agrees to furnish free passage for one person intrusted by said party of the second part with the control of said animals while in transit; and it is expressly agreed, that the said company shall not be liable for any damages which may occur while said animals are being loaded or unloaded, or which may result from their being wild, vicious, unruly, or weak, or their escaping

or dying, or from their injuring or killing themselves or each other; or from heat, suffocation, or improper loadings, or securing in the car or cars, or from said animals being crowded, or from the burning of hay or other material; nor shall the company be liable for delay in transportation, nor for any loss or damage of any kind after delivery at the station from which the company has agreed to forward said animals. The party of the second part agrees to send with said stock one or more men, as may be necessary to care for said stock while in transit, and to load, unload, feed, and water said animals at his own risk and expense, the said company furnishing the necessary labor to assist (while in transit over its lines), under the direction and control of the person put in charge thereof by the party of the second part."

The familiar rule is that each paragraph of a complaint must be good in itself, and must proceed upon a definite theory: *Montgomery v. Craig*, 123 Ind. 48, and cases cited; *Mescall v. Tully*, 91 Ind. 96.

The theory upon which the paragraph of the complaint under immediate mention proceeds is that the appellant is liable to the appellees in damages for a breach of a special contract. There are no allegations indicating that the pleader assumed to state a cause of action in tort; on the contrary, all of the allegations indicate that the pleader assumed to state a cause of action upon the special contracts incorporated in the pleading. The pleading is based solely upon the special contracts, and not upon any general or implied agreement or undertaking. The question, therefore, is this: Does the first paragraph state facts constituting a cause of action for a breach of the special contracts?

We suppose it entirely clear that where a plaintiff declares upon a special contract he must state facts showing an actionable breach of that contract, and that he cannot recover upon any contract except that upon which he specially declares: *Lake Shore etc. R'y Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Fry v. Louisville etc. Ry Co.*, 103 Ind. 265; *Indianapolis etc. R. R. Co. v. Remmy*, 13 Ind. 518. It is, as is well known, a settled rule of pleading that the complaint must state a complete cause of action. It is true, as appellant's counsel assert, that a complaint must affirmatively show that the defendant is in culpable default: *Lime City etc. Ass'n v. Wagner*, 122 Ind. 78; 17 Am. St. Rep. 342. These rules would determine the question as to the

sufficiency of the pleading against the appellees if it could be assumed that it was essential to the existence of a cause of action for them to aver that the failure to transport was not attributable to some one of the causes or perils from which the carrier is released by the special contract; but this cannot be always assumed even where there is a special contract limiting liability. While there is a stiff contest among the authorities as to the burden of proof in such cases, we incline to the opinion that the true rule is, where the articles carried are not live-stock and there is no agreement that the owner's agent shall have charge of the property, the burden is upon the carrier to show that the injury or loss to the shipper was attributable to one of the causes or perils against which the special contract secures immunity.

The text-writers generally declare this doctrine. One of them says: "The shipper, in the first instance, makes out his case by proving his contract and the non-delivery of the goods. The burden of proof is then on the carrier to bring himself within the exemption clauses of the bill of lading, or, in other words, to show that the loss happened by one of the excepted perils. The reason is obvious. The goods were in his custody, and he is bound like all other bailees to account for their loss, if they are lost. The rule is the same where the goods are delivered in a damaged condition. The carrier must show that the damage was caused by one of the excepted causes or perils": *Wheeler on Carriers*, 252. Another author says: "The burden of proving that a loss which has occurred falls within the exemptions provided for by the contract rests ordinarily upon the carrier; but where the loss occurs from such a cause that the law will not presume negligence, or where the loss happens from an excepted cause, as from fire, the burden of proving the carrier's negligence is, by the weight of authority, upon the plaintiff": *Hutchinson on Carriers*, 2d ed., secs. 259a, 736. The rule that the burden is ordinarily on the carrier is supported by principle, and is a just and salutary one. The special contract, although it may release the carrier from some obligations and duties, does not take from him his character as a common carrier. As said by the court in *Witting v. St. Louis etc. R. R. Co.*, 28 Mo. App. 103: "Though the goods may be carried under a special contract, relieving him from the liability of an insurer, still he is none the less a common carrier." In *Railroad Co. v. Lockwood*, 17 Wall. 357, 376, the court said: "But when a car-

rier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation for the purpose of a carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." As the special contract does not take away the character of a common carrier, there remains, notwithstanding the express stipulations of the contract, certain obligations imposed by the law of the land, and these enter into the contract as silent factors: *Long v. Straus*, 107 Ind. 94; 57 Am. Rep. 87. These obligations, although implied, are essential parts of the contract, and among them is the obligation to carry safely, so far as care and diligence will enable the carrier to do. When this obligation is violated, there is, in ordinary cases and with respect to inanimate property, *prima facie* an actionable breach of the contract. In cases where the carrier has full custody of the property, there is, *prima facie* at least, actionable breach of the contract when the failure to safely carry is shown, because, as said in the case of *Inman v. South Carolina R'y Co.*, 129 U. S. 123, 139, "in case of loss the presumption is against the carrier."

The common law has been relaxed so as to permit a common carrier to limit his liability, but this change in the law does not go to the extent of allowing a carrier to contract for a complete exemption from liability, nor does it go to the extent of changing the rule that when the failure to carry is affirmatively shown, the burden of showing exemption from the duties and obligations imposed by law rests upon the carrier.

The rule that the presumption is against the carrier, in cases where he has full charge and custody of the property, is in harmony with the doctrine sustained by a long line of cases, a line beginning far back in the early years of the common law and continuing unbroken to the present, that where injury to a passenger is shown the presumption is that the carrier was in fault. The rule that the burden is on the carrier, who has the exclusive custody of the property, is a reasonable one, inasmuch as it is but just to require the carrier who has the property in complete custody, who knows and controls the men, who manages the instrumentalities of transportation, and who has the means of explanation at hand, to show what caused the loss or injury, rather than to cast that

burden upon the shipper, whose means of information are comparatively meager, and whose power of securing knowledge of the fact is circumscribed within very narrow limits.

The question we have in hand was thoroughly discussed in the case of *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722; and in the course of the opinion it was said, in speaking of a carrier: "Ordinarily, one who delivers to him goods parts entirely with his possession and control over them, and knows nothing of what takes place during the carriage, while the carrier has possession and control over them, and is supposed to know, or have the means of knowing, what happens to them, and if they are lost or injured, how it occurred. The common law recognized the danger of collusion, connivance, and fraud between the carrier and his servants or others, which might leave the owner practically at the mercy of the carrier if he was required to prove negligence or fraud. To make such proof he would ordinarily have to call the very men whose recklessness or frailty caused the injury. To prevent this, the law excused the carrier only upon his proving that the loss or damage occurred from the act of God or public enemy — causes for which he could not be supposed to be responsible. The reasons which require the carrier to excuse himself for his failure apply with as much force to a case of limited as to a case of full common-law liability."

The question whether the rule to which we have referred applies to a case such as this remains for consideration. This case is, it is evident, not the ordinary one where the carrier has exclusive custody of inanimate property. Here we have a special contract made by the shipper and the carrier for the transportation of live-stock at reduced rates of freight, and wherein it is provided that the latter shall be absolved from liability for designated perils, and that the former "shall send with said stock one or more men, as may be necessary, to care for said stock while in transit, to load, unload, feed, and water said animals, at their own risk and expense." The agreement of the owners to take charge of the animals exerts an important influence upon the case. The effect of this agreement is to place the animals in their immediate custody during transportation. Their agent is to care for them, and is to do the things expressly specified. The animals were not, therefore, in the exclusive custody and control of the carrier, so that the case is not within the reason of the rule that the carrier, and

not the shipper, has the burden of proof, because the former has all the means of explanation and excuse at hand. Here the shippers, better than the carrier, can explain many things, and these things they do not undertake to explain, nor do they undertake to show that the loss was not attributable to a failure to perform acts they themselves agreed to perform. They agree that they will care for the animals, feed and water them, load and unload them, and they also agree that this shall be done at their own risk and expense. It seems clear, upon principle, that the owners are bound to aver and prove that the loss was not attributable to a failure to perform their part of the contract, or to negligence in performing the acts which they expressly undertook to perform. As to important things, they were the actors, and they were in a position to know what was done or left undone, and they cannot recover of the carrier without showing that the loss was not attributable to a breach of duty or violation of contract on their part, for they assumed duties as explicitly and fully as did the carrier.

In order to make a complete cause of action, they must show that the breach or wrong which caused the injury was that of the carrier, and not their own. It may be true, as averred, that the appellants did not carry and deliver the horses, and yet not true that it is liable, for it may be that the fault was that of the shippers. The courts cannot assume in such a case as this, where there is a divided custody and dependent duties, that the defendant is liable because the horses were not safely transported and delivered. It may as well be assumed that the fault was that of the plaintiff as that it was the fault of the defendant, for there are here mutual agreements, mutual duties, and the shipper was placed in charge of the property. In view of the nature of the property to be carried, and of the express undertaking of the shippers to care for it while in transportation, we adjudge that it was incumbent upon the plaintiffs to show by the statement of appropriate facts that the loss was not attributable to a breach of the contract stipulations on their part. This they may easily do, if they have a cause of action, by showing what caused the injury to the horses or what was the cause of the failure to safely transport. Many of the cases apply the rule indicated to cases of inanimate property, but it is not necessary in this instance to go that far, and so we here go no further than to hold the rule applicable to cases of the shipment of live-

stock under a special contract wherein the owner undertakes to go with the stock and care for it while in transportation.

Our conclusion that where the property to be carried is live-stock and the owner undertakes to go with and care for it he is bound to show that the injury or loss was not attributable to the failure to perform or the negligent or improper performance of acts which he undertook to perform, is required by authority. In the case of *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 117, the question received full consideration, and the court said: "Under the contract, they (the shippers) took charge of the stock during transportation, and relieved appellant of any responsibility for the discharge of the duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier, which made it his duty to account for the loss of freight, did not devolve on appellant. Being in charge, they are presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they can be entitled to recover."

We regard the case from which we have quoted as correctly deciding the question with which we are immediately concerned, although we are not prepared to yield to it upon some other questions, nor are we quite willing to acquiesce in the doctrine upon the question to which we cite it as broadly as it is stated, for we think the common carrier is always bound to account for a breach of duty not assumed by the shipper, or not covered by an effective exonerating stipulation of the contract between the parties. It is true, as declared by the court in the case cited, that the carrier is not responsible for the failure to perform duties assumed by the shipper, and it necessarily follows from this that to the extent that the shipper takes duties upon himself to that extent they cease to be duties of the carrier, and as they cease to be the duties of the carrier there can be no liability on his part for a breach or a failure to perform.

A terse statement of what we regard as the correct rule is given by the court in *McBeath v. Wabash etc. R'y Co.*, 20 Mo. App. 445, and it is this: "Ordinarily the *onus* is on the defendant to account for the stock, but in case of special con-

tract, whereby the owner agrees to and does take charge of the stock, the burden of proving negligence is upon the plaintiff."

It is, of course, true that the plaintiff may recover where there is a breach of the special contract by the carrier as well as where there is negligence, but this does not affect the principle stated in the case from which we have quoted, for if the duty, whether created by contract or imposed by law, which is violated is that of the plaintiff, there can be no recovery, so that there can be no complete cause of action unless it appears that the plaintiff in charge of the property was himself free from fault or wrong. This may be made to appear by showing the cause of the failure to carry, or of the injury, and that the failure or injury arose from a breach of the legal or contract duty resting upon the carrier.

The doctrine to which we have given our sanction was thus asserted in *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; 15 Am. Rep. 740: "Where the owner contracts, however, to load and unload his stock, and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the property is presumed to know how the injury occurred, and must himself suffer the loss unless negligence is shown on the part of the carrier or his employees." The court in the case from which we have just quoted strongly marks what we consider a peculiar and distinctive feature of this class of cases, namely, the custody and care of the stock by the owner under the special contract. This peculiar feature, as we have already impliedly indicated, marks the class as one different from that in which the shipper has not the care of the property, and assumes no special duties concerning it during transportation. It is evident that the rule applied to this class of cases in one of sound practical justice, since it is but fair and reasonable that the person in immediate charge of live-stock should show how it was injured, as no one has, presumably at least, superior means or opportunities of knowledge. We do not mean that it is necessary for him to show the specific cause of the injury, but we do mean that it is necessary for him to show the cause of the injury with so much detail and clearness as shall make it appear that the injury was caused by a breach of contract or legal duty on the part of the carrier, and not by neglect or failure of himself to do what he bound himself in his special con-

tract to do. Other cases give our conclusion strong support, but we cannot prolong this opinion by commenting upon them, and so cite them without comment: *Clark v. St. Louis etc. R'y Co.*, 64 Mo. 440, 448; *Harvey v. Rose*, 26 Ark. 3; 7 Am. Rep. 595; *Kansas Pacific R'y Co. v. Reynolds*, 8 Kan. 623, 641. We cannot escape the conclusion that principle and authority require that the first paragraph be adjudged to be fatally defective.

The second paragraph of the complaint declares upon the same contracts as those upon which the first paragraph is based, but avers that the injury to the horses was caused by the wrecking and derailling of the train, and that the negligence of the appellant in failing to keep its road and cars in repair and in managing the train caused the wreck and resulting injury. This averment makes the paragraph good, inasmuch as it affirmatively shows that the injury was caused by the carrier's breach of duty, and thus excludes the inference that it was attributable to any failure to perform the duties assumed by the appellees. The third paragraph of the complaint avers with greater particularity the cause of the injury, and shows that the fault was that of the appellant, and is sufficient.

The appellant had a right to test the sufficiency of each paragraph of the complaint, and as the first is bad the judgment must be reversed, inasmuch as we cannot say from the record proper that the judgment rests entirely upon the good paragraphs of the pleading.

Where a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record proper that the judgment rests on the good paragraphs, a reversal must be adjudged. This has long been the settled law of this state: See authorities cited in Elliott's Appellate Procedure, secs. 638, 666, 669; but if we should depart from this settled rule it would do the appellees no good, for it is evident that the trial court put the case to the jury upon a radically erroneous theory. In proof of this it is sufficient to quote from the second instruction, given at the appellees' request, this language: "And I now instruct you that if you find from the evidence that the plaintiffs and the defendant did enter into said written contracts, and the three carloads of horses were delivered by plaintiffs to defendant at East St. Louis, and loaded on defendant's cars, to be carried and transported to the city of Plymouth, Indiana, over the lines of railway operated by defendant, and you further believe from the

evidence that the defendant failed to deliver all or any of the horses mentioned in said live-stock contracts to the plaintiffs at the city of Plymouth, then, in such case, your verdict should be for the plaintiffs."

The doctrine thus broadly declared is unsound. It would not be sound even in cases where the special contract does not require the shipper to assume charge of the stock, for it is conclusively settled that a carrier may limit his liability, and that where the liability is limited by special contract, there can be no recovery in cases where the loss is caused by one of the perils from which the contract effectively exempts the carrier: *Michigan etc. R. R. Co. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Ohio etc. R'y Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *St. Louis etc. R'y Co. v. Smuck*, 49 Ind. 302; *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Indianapolis etc. R. R. Co. v. Allen*, 31 Ind. 394; *Rosenfeld v. Peoria etc. R'y Co.*, 103 Ind. 121; 53 Am. Rep. 500. There is, indeed, no contrariety of opinion upon the proposition that a special contract may be made limiting the liability of a carrier, nor is there any conflict upon the proposition that where the loss is caused by one of the perils from which the contract exonerates the carrier there is no liability. While a carrier cannot contract for exemption from his own fraud or negligence, he may, by special contract, free himself from many common-law liabilities: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Kansas etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *United States etc. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich etc. Co.*, 55 Wis. 319; 42 Am. Rep. 713; *Moulton v. St. Paul etc. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Bartlett v. Pittsburgh etc. R'y Co.*, 94 Ind. 281, 288. It is doubtful, under the authorities, whether the instruction would be correct even if there were no special contract, since it is held by many cases that where live-stock is carried, it is not enough to show a mere failure to deliver: *Pittsburgh etc. R'y Co. v. Hollowell*, 65 Ind. 188; 32 Am. Rep. 63; *Pittsburgh etc. R. R. Co. v. Hazen*, 84 Ill. 36; 25 Am. Rep. 422; *Bartlett v. Pittsburgh etc. R. R. Co.*, 94 Ind. 281; *The Saragosa*, 3 Wood, 380; *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205; *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466; but whatever may be the rule where live-stock is carried and there is no special limiting contract, it is quite clear that where live-stock is transported under such a special contract as that referred to in the instructions in this case there

is no unrestricted common-law liability, and the plaintiff can not recover solely upon evidence of a failure to deliver.

Judgment reversed.

CARRIERS — POWER TO LIMIT LIABILITY BY CONTRACT. — While a carrier cannot exempt himself from liability for loss resulting from his gross negligence, still he may, by express contract, limit his common-law liability: *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107, and note; *Chicago etc. R'y Co. v. Chipman*, 133 Ill. 96; 23 Am. St. Rep. 587, and extended note discussing the subject thoroughly. See also *Johnson v. Alabama etc. R'y Co.*, 69 Miss. 191; 30 Am. St. Rep. 534, and note.

CARRIERS — BURDEN OF PROOF ON CARRIER CLAIMING EXEMPTION, WHEN. When a carrier claims exemption from liability for injury to goods under a special contract, the burden of proof is upon him to show that the loss or damage resulted from one or more of the excepted causes in the contract, and without his fault: *Johnson v. Alabama etc. R'y Co.*, 69 Miss. 191; 30 Am. St. Rep. 534, and note; but when there is proof of the fact of injury to goods during transportation, but the manner of its occurrence does not import negligence on the part of the carrier, he is not liable if his contract is for limited liability only, unless there is proof of negligence as an inducing cause of the injury, and the burden of making such proof is on the shipper: *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800.

CARRIERS OF LIVE-STOCK — CONTRACT LIMITING LIABILITY: See *Chicago etc. R. R. Co. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436, and note with cases collected; extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213.

TURNER v. CONKEY.

[132 INDIANA, 248.]

HABEAS CORPUS — ISSUANCE OF. — JURISDICTION. — When a court has jurisdiction to adjudge a petitioner to the custody from which he seeks to be released by *habeas corpus* grounded on errors committed by the committing magistrate, the writ will not issue.

JUSTICE'S JUDGMENT — COLLATERAL ATTACK. — When there is general jurisdiction of a subject, although vested in an inferior tribunal, its judgment cannot be collaterally attacked.

JUSTICE'S JUDGMENT — COLLATERAL ATTACK FOR ERROR. — An intermediate error of an inferior tribunal, such as a refusal to grant a change of venue, does not so destroy jurisdiction as to lay its judgment open to collateral attack.

HABEAS CORPUS — JUSTICE'S JUDGMENT. — A judgment of a justice of the peace holding a prisoner in custody for trial in a case where jurisdiction exists cannot be successfully assailed collaterally by application for writ of *habeas corpus*.

W. C. McMahan, for the appellant.

W. B. Reading, for the appellee.

ELLIOTT, J. The appellant prosecutes this appeal from a judgment rendered upon a petition for a *habeas corpus* filed by the appellee. The material facts stated in the petition are, in substance, these: The petitioner was arrested upon a charge of felony, and taken before a justice of the peace for a preliminary hearing. The justice of the peace overruled a motion for a change of justices, and upon a hearing decided against the petitioner and required him to give bail to answer the charge preferred against him. The petitioner failed to give bond, and he was committed to the custody of the appellant, who is the sheriff of Lake County. The appellant unsuccessfully moved to quash the writ, and reserved proper exceptions.

We may say, at the outset, that we do not deem it necessary to decide the question as to the right of an accused to have a change of justices in such a case as this, and we direct our decision to other questions.

The petition charges that the restraint is illegal because of the refusal of the justice to grant the change asked by the petitioner. The question presented is one of jurisdiction. If the filing of the affidavit and the request for the change completely defeated jurisdiction, the commitment was void, and the petitioner entitled to the writ. If, however, there was jurisdiction, the petitioner was not entitled to the writ, no matter how flagrant or palpable the error of the justice of the peace in denying the change for which the petitioner applied. The rule everywhere prevailing is that if there is jurisdiction to adjudge a petitioner to the custody from which he seeks to be released, the writ will not issue: *Holderman v. Thompson*, 105 Ind. 112; *Lowery v. Howard*, 103 Ind. 440; *Smith v. Hess*, 91 Ind. 424; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *Stevens v. Fuller*, 136 U. S. 468; *People v. Iscomb*, 60 N. Y. 559; 19 Am. Rep. 211; *Ex parte Miller*, 82 Cal. 454. In the case of *Willis v. Bayles*, 105 Ind. 363, this general doctrine was applied to the judgment of a justice of the peace. The cases of *In re Luis Oteiza y Cortes*, 136 U. S. 330, and *Stevens v. Fuller*, 136 U. S. 468, involved the validity of proceedings before a United States commissioner, and the general rule we have stated was approved and enforced. In the cases of *People v. St. Dominick*, 34 Hun, 463, *Bennet v. People*, 4 Barb. 31, and other cases cited in the first-named case, the judgments called in question were those of inferior statutory tribunals.

If the judgment indirectly assailed by the petition had

been a final one, there could be no doubt that if there was jurisdiction to enter it the assault would fail, since, as the cases all agree, where the inferior tribunal has jurisdiction, its judgments cannot be collaterally assailed. We can conceive no reason why a different rule should apply to a case where the authority of the inferior tribunal is to hold an accused to bail and in default of bail commit him to the custody of the proper officer of the law. It can make no difference, so far as the mere question of holding in custody is concerned, whether the judgment is a final one entered upon a regular trial or is a judgment rendered upon a preliminary examination, for if there is power to give the judgment directing the restraint the judgment cannot be void.

The statute invests justices of the peace with general authority to conduct preliminary examinations and to recognize accused persons to the court clothed with criminal jurisdiction. The authority is extended over a general subject, and in this instance the assumption of jurisdiction was legal, and there was no judgment beyond that jurisdiction; that is, there was no excess of jurisdiction. Our decisions affirm that where there is general jurisdiction of a subject, although that jurisdiction is vested in an inferior tribunal, there can be no collateral attack: *Jackson v. Smith*, 120 Ind. 520, and cases cited; *Alexander v. Gill*, 130 Ind. 485; *Chicago etc. R'y Co. v. Sutton*, 130 Ind. 405, and cases cited. See, also, authorities cited in Elliott's Appellate Procedure, secs. 501, 503. The presence of authority to proceed in the particular case is jurisdiction: Elliott's Appellate Procedure, secs. 12, 499. The record in the case before us shows that there was power to proceed, for the law invested the inferior tribunal with authority over the class of cases to which the case of the petitioner belongs. As there was such authority, the tribunal was empowered to decide all questions that arose in the particular case, and that power is not affected by the correctness or the incorrectness of the decisions: *Snelson v. State*, 16 Ind. 29. See authorities cited in Elliott's Appellate Procedure, section 715, note 3.

As the sufficiency of an affidavit for a change of venue, as well as the question as to the time of filing and the like, are questions of procedure, it seems clear that such questions must be decided by the tribunal which rightfully entered upon the hearing of the case, and that whether such questions are rightly or wrongly decided does not affect the ques-

tion of jurisdiction. A wrong decision may constitute error, but it does not destroy jurisdiction. It is quite clear that the refusal of a judge of a superior court to call in another judge does not destroy jurisdiction, although it may be a palpable wrong, entitling the injured party to relief in a direct attack. There is no valid reason why the same rule should not apply to an inferior tribunal invested with authority over the general class of cases of which the particular case is a member. Mischievous consequences must necessarily result from the doctrine that a refusal to grant a change of justices or of venue takes away all jurisdiction and makes the proceeding void. If there is no jurisdiction, and the proceedings become absolutely void, then the officers would be liable to a civil action. This would be especially unjust to the ministerial officer who executed the process, and unjust to the judicial officer who errs in denying the application.

In the case of *State v. Wolever*, 127 Ind. 306, the principle that where there is jurisdiction of a class of cases vested in any judicial tribunal, superior or inferior, the judgment is not void, although there may be a palpable error in denying an application for a change of venue, is laid down, and that is the principle which underlies the case we have in hand. It is proper to say of the opinion in that case that it is apparent that the word "must," employed in the second paragraph on page 318, should be "may," for the context shows this, as does the criticism upon the cases of *Krutz v. Howard*, 70 Ind. 174; *Dietrichs v. Schaw*, 43 Ind. 175; *Barkeloo v. Randall*, 4 Blackf. 476; 32 Am. Dec. 46. It is probable that the error is due to a mistake in proof-reading, but however this may be, it is evident that the general tenor of the opinion discloses the error. It is also true that the reading we have suggested is necessary to bring the opinion into harmony with the decisions in such cases as *Alexander v. Gill*, 130 Ind. 485; *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 658; *Reed v. Whitton*, 78 Ind. 579; *McCoy v. Able*, 131 Ind. 417; *Perkins v. Hayward*, 132 Ind. 95. An application for a writ of *habeas corpus* is, in such a case as this, a collateral attack, and to hold that an intermediate wrong ruling, however material or palpable, subjects the judgment assailed to question would be to violate the rule laid down in the cases cited, as well as in a very great number of other cases: *Hume v. Conduitt*, 76 Ind. 598; *Brown v. Eaton*, 98 Ind. 591; *Loesnitz v. Seelinger*, 127 Ind. 422, and cases cited; *Goodell v. Starr*, 127 Ind. 198, and

cases cited; *Harrod v. Dismore*, 127 Ind. 338; *Bass v. City of Fort Wayne*, 121 Ind. 389, and cases cited; *Montgomery v. Waseem*, 116 Ind. 343, and cases cited. See also authorities cited in Elliott's Appellate Procedure, sec. 171.

The principle that intermediate errors of an inferior tribunal do not so destroy jurisdiction as to make the judgment void has often been applied to the judgments of committing magistrates. In *Merriman v. Morgan*, 7 Or. 68, it was held that in applications for *habeas corpus* the court can only consider matters affecting the jurisdiction, and in the course of the opinion it was said: "The most that the court could have done in this *habeas corpus* case was to examine the warrant of commitment and the proceedings of the magistrate, so far as to see if he had jurisdiction of the subject-matter on which he founded judgment." The court adopted, as a correct exposition of the law, from the opinion *In re Prime*, 1 Barb. 340, this statement: "We cannot inquire into the technicalities or the strict regularity of the proceedings. This writ is not intended to review the regularity of proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law." Pausing here to add a word of comment, we may say that in this instance there was much more than "color of law"; for here there was full jurisdiction of the general subject and of the person; as to these matters there is no infirmity or defect. If there be any infirmity or defect, it was in ruling improperly and erroneously upon an intermediate motion.

In the case of *In re Eldred*, 46 Wis. 530, an order of arrest was issued by a magistrate, and the party arrested applied for a writ of *habeas corpus*, and it was held that he was not entitled to the writ. The opinion of the court was delivered by Ryan, C. J., who said, in speaking of the writ of *habeas corpus*, that "the latter writ, in such a case, raises only the question of jurisdiction of the court or officer to issue the process of arrest." This we regard as a correct statement of the law applicable to committing magistrates as well as to inferior tribunals empowered to enter final judgments, and we adjudge that it governs this case.

We have given this case a more extended consideration than we should have felt it necessary to do if it were not for the decision in the case of *Smelzer v. Lockhart*, 97 Ind. 315, which asserts a doctrine different from that here laid down. There is not a single authority adduced in support of the con-

clusion there declared, nor is there any extended line of reasoning. The question is disposed of in a few sentences. The reason given for the conclusion there asserted is that the duty to grant a change is an imperative one. This we should not regard as a sufficient reason if there were no opposing decisions, although if there were no such decisions we might feel bound to yield to the case referred to under the rule *stare decisis*. There are, however, such decisions, and either these decisions or that under immediate mention must fall. It is true of every case where a justice of the peace is called on to rule upon a sufficient affidavit for a change of venue, or a plea to his jurisdiction or the like, that it is his imperative duty to do what the law requires, yet if he does not do what it is his duty to do, jurisdiction is not affected, provided, of course, it once fully attached. The duty in *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658, was even more clearly imperative than it was in this, and yet it was held, in accordance with the authorities, that the judgment of the justice of the peace could not be successfully assailed by an application for a writ of *habeas corpus*. But we need not particularize the cases which oppose *Smelzer v. Lockhart*, 97 Ind. 315, for it is enough to affirm that it is contrary to all our well-considered cases upon the subject of collateral attack. It has been in effect, although not in direct terms, overruled by more recent decisions.

Judgment reversed.

HABEAS CORPUS — ERRONEOUS JUDGMENT OF CONVICTION BY JUSTICE. — Where the justice entering the judgment had jurisdiction of the subject-matter and the person of the defendant, that his judgment of conviction was erroneous does not entitle the defendant to be discharged on *habeas corpus*: *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 658, and note; *Platt v. Harrison*, 6 Iowa, 79; 71 Am. Dec. 389, and note.

JUSTICES' JUDGMENTS — CONCLUSIVENESS — COLLATERAL ATTACK. — A judgment of a justice of the peace in a case wherein he had jurisdiction is as conclusive as that of any other court, and not subject to collateral attack: *Mitchell v. Hawley*, 4 Denio, 414; 47 Am. Dec. 260, and note; *Spruelling v. Chamberlain*, 12 Vt. 538; 36 Am. Dec. 358; *Heck v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915, and note. A justice's court under the constitution has a defined, and within certain limits exclusive, jurisdiction; its judgments cannot be collaterally attacked as void, though the records do not show jurisdictional facts: *Williams v. Bull*, 51 Tex. 693; 36 Am. Rep. 730; *Billings v. Russell*, 23 Pa. St. 153; 62 Am. Dec. 330, and note.

STATE v. BECKNER.

[132 INDIANA, 371.]

SHERIFFS AND CONSTABLES—UNLAWFUL LEVY—LIABILITY OF SURETIES.—

When an officer in discharging his official duties commits a trespass by breaking open an outer door in attempting to execute civil process in replevin, he and his bondsmen are liable in damages for all injuries received by the householder in resisting such unlawful levy.

REPLEVIN.—IN ORDER TO CONSTITUTE VALID LEVY in replevin the act of taking possession must be of such character as would make the officer, if not protected by the process, liable for trespass.

SHERIFF—BREAKING OUTER DOOR TO COMPLETE LEVY, WHEN JUSTIFIED.—

When an officer has, in obedience to his writ of replevin and in its partial execution, taken possession of the property and gone away, he may upon his return to complete the levy, if necessary, break open an outer door without committing a trespass.

SHERIFFS—TRESPASS IN BREAKING OUTER DOOR TO EXECUTE CIVIL PROCESS—RIGHT OF HOUSEHOLDER TO RESIST.— An officer is not justified in breaking open an outer door or window in order to execute civil process, as a writ of replevin. If he does break open such door or window, he commits a trespass which renders his subsequent acts unlawful, and justifies the householder in resisting his further progress in serving the writ.

T. F. Gaylord, for the appellant.

J. M. Dresser, for the appellees.

MILLER, J. This was an action brought by the relator against a constable and his surety on his official bond. The cause was tried by a jury and a special verdict returned. Each party made a motion for a judgment upon the verdict. The motion of the appellant was overruled, and that of the appellees was sustained.

The only questions involved in this appeal relate to the ruling upon these motions. The questions presented are,—

1. Had the officer authority to enter the residence of the relatrix to serve the civil process in his hands under the circumstances disclosed in the verdict of the jury?

2. If no such authority existed, do the wrongs and injuries complained of afford a right of action on the bond?

The facts stated in the verdict, so far as we need call attention thereto, are substantially as follows,—

The relatrix and her two daughters composed a family of which she was the head, and occupied as a residence a certain dwelling-house in the city of Lafayette. Mrs. Mattie C. Smith, one of the daughters, had in her possession in said dwelling a sewing-machine. On the eighth day of February,

1883, the Howe Sewing-machine Company brought an action of replevin before a justice of the peace against Mrs. Smith for the possession of said sewing-machine, and in the forenoon of that day said justice issued and delivered to the appellee Beckner, as constable, a writ of replevin commanding him to take said sewing-machine and to deliver the same to said Howe Sewing-machine Company. Immediately upon receiving said writ said constable called at the residence of the relatrix and was by her admitted into the same. After having been admitted into said dwelling-house he stated to the relatrix that he had a writ of replevin for the sewing-machine of said Mattie C. Smith, who, although a resident of said dwelling-house, was temporarily absent on said day; that at said time said sewing-machine was, without fraud, in said dwelling-house; that the relatrix pointed out to him the sewing-machine, which was then and there in the northeast corner of the sitting-room; that said Beckner did not take possession of said sewing-machine, but went away without having done so; that after said Beckner went away from the dwelling-house the relatrix took said sewing-machine and put the same in a bedroom adjoining the sitting-room on the west, locked the door of the bedroom, and took and placed a sewing-machine belonging to her daughter Anna in the place where the sewing-machine of said Mattie C. Smith had been when it was pointed out to said Beckner in the morning.

On the afternoon of the same day Beckner, in company with two other persons whom he had engaged to assist him to execute his writ, went to said dwelling-house for the purpose of executing said writ by taking possession of said sewing-machine, and with the intention of taking possession of the same, and if necessary carrying it away by force; that said Beckner, upon arriving at said dwelling-house, rang the doorbell attached to the front and outer door; the relatrix, upon going to said door, opened it a few inches, when said Beckner, upon said door being so opened, slipped his cane in, and the relatrix thereupon said, "Oh, it is you, is it?" and immediately, and before the said Beckner had entered or partly entered said dwelling-house, attempted, by leaning and pushing against the said door, to close the same and to keep said Beckner from entering said dwelling; that said Beckner called to his associates to come, and then and there, with the purpose and object of executing his said writ as constable as aforesaid, by obtaining possession of the sewing-machine therein

called for, and claiming to act under the power and direction of said writ, pushed with great force on said outer door of said dwelling-house, and forced the same open against the will and power of said relatrix, who was thereby thrown back on a bannister near said door and injured. After the officer had gained an entrance into the dwelling, he proceeded to execute the command of his writ, the relatrix resisting him at every step. During the struggle the relatrix received further injuries. This action was brought to recover damages because of such injuries.

It is contended by counsel for the appellant that in view of the facts disclosed by the verdict, the constable was acting *virtute officii*, not merely *colore officii*. With this contention we are in accord. The constable had a legal process, and his sole purpose seems to have been the execution of the command which it carried to him. There is some conflict of authority as to whether or not there is a right of action on the bond of a ministerial officer for an unlawful act done *colore officii*: Brandt on Sureties, sec. 566; *Commonwealth v. Cole*, 7 B. Mon. 250; 46 Am. Dec. 506, and notes; but when the officer is acting *virtute officii*, the authorities all agree that a suit will lie upon his bond. In *Clancy v. Kenworthy*, 74 Iowa, 740; 7 Am. St. Rep. 508, the sureties on the bond of a constable were held liable in an action for a breach of an official bond caused by an unlawful arrest made by the officer. In *Cash v. People*, 32 Ill. App. 250, the sureties were held liable for an unlawful assault made by a constable in making an arrest.

It necessarily follows that if the constable in the case under consideration was guilty of unlawful conduct in the discharge of his official duties, to the injury of the relatrix, he and his surety must respond in damages, and the trial court was in error in rendering judgment for the appellee. Upon the other hand, if what the constable did was under the circumstances justifiable, then the court did not err.

The writ under which the officer was acting was but a civil process, and did not authorize him to force the outer door of a dwelling: 2 Freeman on Executions, sec. 236; *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551; note to *McGee v. Given*, 4 Blackf. 16; *Curtis v. Hubbard*, 1 Hill, 336; *Curtis v. Hubbard*, 4 Hill, 437; 40 Am. Dec. 292.

In actions of replevin the sheriff may, under our statute, Rev. Stats. of 1881, sec. 1271, in some cases cause a building

or inclosure to be broken open, but no similar statute gives such right to a constable. Except as modified by statute, the common-law principle that every man's house is to be treated as his castle and kept sacred from forcible intrusion prevails in this state.

The verdict informs us that when the constable went to the dwelling-house of the relatrix in the forenoon, he stated to her that he had a writ of replevin for the sewing-machine of Mrs. Smith, and the same was pointed out to him, but that he did not take possession of the machine, but went away without having done so; also, that in the afternoon he went to the dwelling-house with his assistants "for the purpose of executing his said writ by taking possession of said sewing-machine." It appears that all he did in the forenoon was to ascertain the presence of the sewing-machine in the dwelling-house of the relatrix, taking no steps to take the same into his own possession. Mrs. Smith, the owner of the machine and defendant in the action, not being present, could not have waived any of her rights of possession.

The essential part of a writ of replevin is the command to seize the property; this, therefore, is the first duty of an officer on receiving such a writ: *Cobbey on Replevin*, sec. 633. "Service on the property means actual seizure. A constructive seizure will not do": *Cobbey on Replevin*, sec. 634.

There is much similarity between taking possession of personal property under a writ of replevin and a levy on the same under a writ of execution. In order to constitute a levy upon personal property, possession must be taken; a mere paper levy will not in general be sufficient: *Standard Oil Co. v. Bretz*, 98 Ind. 231; *Dawson v. Sparks*, 77 Ind. 88; *Duncan's Appeal*, 37 Pa. St. 500. In order to constitute a valid levy upon personal property, the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for trespass. *Portis v. Parker*, 8 Tex. 23; 58 Am. Dec. 95; *Beekman v. Lansing*, 3 Wend. 446; 20 Am. Dec. 707; *Davidson v. Waldron*, 31 Ill. 120, 133; 83 Am. Dec. 206; *Murfree on Sheriffs*, sec. 523.

It seems that on the occasion referred to the officer did nothing by which the property described in his writ passed into the custody of the law.

We think it clear that if the officer had, in obedience to his writ and in its partial execution, taken possession of the property, he might, upon his return to complete his levy if

necessary have broken open the outer door: *Freeman on Executions*, sec. 256.

A distinction has been made in some cases between the right of an officer to break the outer door of a dwelling-house in the service of an ordinary execution, and of a writ which requires him to take possession of a particular thing, such as a writ of replevin, holding that in the latter case he may, after first demanding admittance, break down the outer door: *Keith v. Johnson*, 1 Dana, 604; 25 Am. Dec. 167; *Howe v. Oyer*, 50 Hun, 559.

In the latter case the officer was proceeding under a statute giving him extraordinary powers where the property had been concealed, somewhat similar to that given a sheriff by our code (section 1271), and is therefore not in point here. The writ of replevin mentioned in *Keith v. Johnson*, 1 Dana, 604, 25 Am. Dec. 167, was such as issues after the final ownership of the property had been determined by the judgment of a court, and the owner of the dwelling been commanded to surrender the same to the true owner. The case is not an authority under a procedure such as is provided by our code.

If the officer had no authority to force the outer door of the dwelling-house of the relatrix in the execution of his writ, his conduct as disclosed in the verdict amounted to a trespass.

In *State v. Armfield*, 2 Hawks, 246, 11 Am. Dec. 762, Wright, a constable, having a writ of *feri facias* against the property of Patterson, went with Armfield to Patterson's house to make the levy. A member of the family, seeing their approach, jumped into the house and attempted to shut the door to prevent their entrance, but while in the act of shutting the door, and before it was entirely closed, though so far closed as to require force to open it, Wright pushed against it and entered the house, Armfield being present. The court instructed the jury that if the officer, aided and abetted by the defendant, forced open the door, they were guilty, and the process was no protection to them. In an opinion affirming a judgment of conviction, the court said: "I am of opinion that the charge of the court was correct in this case, and that the defendant was properly convicted. The law is clearly settled that an officer cannot justify the breaking open an outward door or window in order to execute process in a civil suit; if he doth, he is a trespasser. A man's house is deemed his castle, for safety and repose to himself and family; but the

protection and repose would be illusive and imperfect if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peacefully before the door is shut, he ought not to attempt it, for this unavoidably endangers a breach of the peace, and is as much a violation of the owner's right as if he had broken the door at first."

We regard this case as a correct enunciation of the law applicable to the question under consideration.

In our opinion the officer in forcing an entrance into the dwelling-house was guilty of a trespass, which rendered his subsequent acts unlawful, and justified the relatrix in resisting his further progress in serving the writ by force: *Curtis v. Hubbard*, 4 Hill, 437; 40 Am. Dec. 292.

The jury found that the sewing-machine of Mrs. Smith was in the dwelling-house of the relatrix without fraud. We are unable to see how the shifting of the machine to another room and the substitution of another in its place could in any manner authorize the officer to break the outer door, he necessarily being in ignorance of the change, and having the right, when once lawfully admitted, to break down inner doors in the discharge of his official duties.

We regard this case as one in which justice demands that a new trial be awarded rather than a mandate to render judgment for the appellant upon the verdict: *Murdock v. Cox*, 118 Ind. 266; *Shoner v. Pennsylvania Co.*, 130 Ind. 170.

Judgment reversed, with instructions to grant a new trial.

SHERIFFS — POWERS AND DUTIES IN LEVYING ON CHATTELS. — In order to constitute a valid levy on chattels, the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for trespass: *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 207; *Goode v. Longmire*, 35 Ala. 668; 76 Am. Dec. 309; *Weatherby v. Covington*, 3 Strob. 27; 49 Am. Dec. 623, and note; *Westervelt v. Pinckney*, 14 Wend. 123; 28 Am. Dec. 516, and note.

SHERIFFS — MISCONDUCT IN THE EXECUTION OF PROCESS: See extended note to *Commonwealth v. Cole*, 46 Am. Dec. 513.

SHERIFFS — LIABILITY OF SURETIES FOR UNLAWFUL LEVY. — The indemnitors of an officer who has levied upon property not subject to his writ are jointly and severally liable as principals for the original unlawful taking: *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533, and note. A sheriff's bondsmen are liable for his trespass in seizing property not subject to his writ: *State v. Moore*, 19 Mo. 369; 61 Am. Dec. 563, and note; note to *Ives v. Jones*, 40 Am. Dec. 425. A sheriff is liable in trespass to the owner of property sold without authority: *Forsythe v. Ellis*, 4 J. J. Marsh. 298; 29 Am. Dec. 218, and note.

CITY OF FORT WAYNE v. HAMILTON.

[132 INDIANA, 487.]

MUNICIPAL CORPORATIONS — LIABILITY FOR WRONGFUL APPROPRIATION OF LAND FOR STREET. — When a city permanently takes and appropriates private property for a street without condemnation proceedings and without making compensation to the owner, it is guilty of a trespass, and is liable, as a tort-feasor, for taking private property without complying with its charter.

MUNICIPAL CORPORATIONS — WRONGFUL APPROPRIATION OF LAND FOR STREET — DAMAGES. — When a city wrongfully takes possession and appropriates private land to street purposes, to the permanent injury of the owner, without making compensation, and he recognizes in his complaint for damages the right of the city to continue in the use of the property taken and to succeed to his title, his damages may be assessed upon the basis of the value of the property taken. In arriving at the amount of damages, the value of the property with the improvement may be deducted from its value without the improvement.

PRACTICE — STRIKING OUT PART OF ANSWER — PRESUMPTION. — When a paragraph in an answer is stricken out, and the evidence admissible under that paragraph is admissible under the general denial filed, it will be presumed that it is stricken out upon that ground.

STATUTE OF LIMITATIONS — PENDENCY OF ANOTHER ACTION. — A cause of action cannot be said to have accrued until an action can be instituted thereon, and when the regularity of the proceedings for the condemnation of land, as well as the amount of damages due the owner, is pending on appeal, he cannot bring an independent action for such damages. Hence, if he brings his action to recover damages for the injuries sustained, within two years from the termination of the action involving the regularity of the condemnation proceedings, his right to relief is not barred by the statute of limitations.

H. Colerick and W. S. Oppenheim, for the appellant.

S. R. Morris, R. C. Bell, J. Morris, and J. M. Barrett, for the appellees.

MILLER, J. This was an action brought by the appellees against the appellant to recover for the taking of a strip of land for a street.

The complaint alleges that the appellant, on the — day of —, 1873, unlawfully entered upon and took possession of a strip of land, sixty feet in breadth, and extending north and south through the Hamilton homestead in said city, then and ever since the property of the appellees, with the view of extending Clinton Street, in said city, through and across said homestead, without the consent and against the will and protest of the appellees; that the appellant proceeded illegally, against the will and repeated protests of the appellees, to construct and build a street and sidewalk upon said strip of land,

to dig up and remove therefrom the soil, shrubs, and shade trees, and permanently to hold, use, and occupy said strip of land unlawfully and against the will of the appellees, as one of its public streets. It is alleged that the land so taken, held, and used was, at the time, of the value of thirty thousand dollars. It is also averred that while the appellant so unlawfully took, held, and used said strip of land the appellees again and again demanded the possession of the same, but that appellant refused to restore to them or permit them to take possession of the same. It is further averred that before the commencement of this suit, to wit, on the twenty-seventh day of September, 1887, the appellees notified the appellant in writing that it could no longer hold and use said strip of land for and as one of its public streets or otherwise, except upon the condition that it pay to the appellees the full value thereof, and that they, the appellees, would regard its further use and occupancy by the appellant as a public street, as an agreement to permanently hold and occupy as its own said strip of land as one of its public streets, and pay to the appellant the full value thereof. It is also averred that after the receipt of said notice, the appellant continued exclusively to hold, use, and occupy said strip of land as one of its public streets and as its own property; and the appellees in their complaint offer, upon being paid the value of their land so taken and held, to fully recognize the appellant's right thereto, and furnish it such assurance of title as may be just and right.

The appellant demurred to the complaint. Its demurrer was overruled, and an answer in four paragraphs filed, the second of which was subsequently drawn.

The first paragraph of answer was a general denial.

The third paragraph was as follows: "And for a third paragraph of answer to plaintiff's complaint the defendant says that the cause of action of plaintiffs is for the opening of Clinton Street in said city of Fort Wayne; that said city began proceedings to have said land condemned and the proper assessment of damages and benefits made as provided by law; that said strip of land was occupied and street opened under such proceedings, but that on appeal, at plaintiff's instance, said proceedings were wholly set aside and held for naught.

"Defendant further avers that the benefits that accrued to the property of plaintiffs through which said Clinton Street was thus opened were in excess of the injuries and damages accruing thereto; that the real estate of plaintiffs on both

sides of said strip of land so taken, which was then, and is now, the property of plaintiffs, was benefited in the sum of thirty-five thousand dollars by reason of the taking of the strip of land described in the complaint and opening said street."

The fifth paragraph of answer was the six years' statute of limitations pleaded to all of the complaint, except such as seeks to recover for the value of the real estate taken.

A fourth paragraph of answer was filed and held good on demurrer, but it need not be set out or noticed.

To the fifth paragraph of answer the appellees replied,—

1. That the proceedings for the appropriation of the land were continuously pending from the year 1873 until April 2, 1886, when they were dismissed, and that the suit was begun on the twenty-first day of November, 1887.

The third paragraph of answer was, on motion of the appellees, struck out, and a demurrer to the first paragraph of the reply to the fifth paragraph of answer was overruled.

The cause was tried by a jury, and a verdict and judgment rendered against the appellant.

The errors assigned here are that the court overruled the demurrers to the complaint and to the reply to the fifth paragraph, and overruled the appellant's motion for a new trial.

In support of the demurrer the appellant contends that cities have no power to purchase land for the opening, extension, or enlargement of its streets, and pay for it out of the general funds of the city; that towns and cities can only acquire real estate for street purposes by accepting its dedication, or by pursuing the method provided by statute for its condemnation and the assessment of damages and benefits; that the statute contemplates that the cost of the opening or extension of a street shall be borne by the property-holders whose lands are benefited by the change, without becoming a charge upon the general revenues of the city; that a city having no right to become the purchaser of land to be laid out into streets, it cannot be held liable as upon an implied contract for the payment of the price of land taken for that purpose. In other words, that a city cannot be held liable as upon an implied contract in a matter where it has no power to make an express one.

It is also insisted that the title to the premises taken by the appellant is and must of necessity remain in the appellees, and that their only remedy is to recover its possession and

damages for any injury it has sustained, or to have damages assessed against the property benefited as provided by statute.

While there is some confusion in the manner in which the cause of action is stated in the complaint, we are of the opinion that it sounds in tort rather than upon a contract, express or implied. We do not regard the notice served by the appellees upon the city that they would regard the continued occupancy of the ground by the city as an agreement to pay them its full value, as the foundation of the cause of action.

The nature of the pleading must be determined from its general character, scope, and tenor: *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *First Nat. Bank v. Root*, 107 Ind. 224; *Bingham v. Stage*, 123 Ind. 281; *Pearson v. Pearson*, 125 Ind. 341; *Batman v. Snoddy*, 132 Ind. 480.

The cause of action is predicated upon the wrongful taking or retention of the appellees' property, and its permanent appropriation and use for a public street.

Whatever doubts may exist as to the right of a municipal corporation to purchase real estate for its streets or other thoroughfares, there can be none as to its liability as a tortfeasor for taking possession of private property without complying with the charter under which it is incorporated: 2 Dillon on Municipal Corporations, sec. 971.

The appellant's counsel in their brief do not deny the liability of the city for the trespass, in an action of trespass, but insist that a recovery will be limited to direct injuries, and could in no event include the value of the strip of land appropriated. In *Soulard v. St. Louis*, 36 Mo. 546, the precise question involved in this case came up for decision. In that case the city, without causing the land to be condemned and appropriated, as provided in its charter, took possession of the plaintiff's land and used it as one of its public streets for the period of about ten years before the commencement of the suit. Before bringing suit the plaintiff signified to the city his willingness to permit the permanent use of the land for street purposes upon the payment to him of the first value of his land. In the course of the opinion it is said: "The whole burden is devolved on the city of taking the initiative to procure the condemnation, and no provision is made by which the value can be ascertained or the quantity of damages assessed by the voluntary action of the owners of the property. Where the legislature authorizes an act of this kind, the natural and inevitable result of which will be to damage or appro-

priate the property of another, and at the same time points out the mode, at the election of either party, how these damages can be ascertained and redress obtained, the common-law remedy will be taken to be superseded and the statutory remedy exclusive: *Baker v. Hannibal etc. R. R. Co.*, 36 Mo. 543; but where no such remedy is given at the election of the party complaining of the injury, the common-law right of action remains unaltered. In this case, the city proceeded to take and appropriate the plaintiff's property without pursuing the mode prescribed in its charter authorizing it to enter upon and use for its own purpose the land of another whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, was without authority of law; it was wrongful, and amounted to a trespass." In speaking of the measure of damages it was said: "In regard to the measure of damages, it has already been prescribed by this court in *Mueller v. St. Louis etc. R. R. Co.*, 31 Mo. 262, a case involving essentially the same principle. It was there held, on the authority of *Jones v. Gooday*, 8 Mees. & W. 146, that in an action for damages for wrongfully entering upon land and taking and carrying away the soil, etc., the proper measure of damages is not the actual damages sustained, but the value of the land removed; and as the defendant has taken and appropriated to its own use the land used as a street, its fair and reasonable value will afford the criterion in estimating the damages."

The court also expresses the opinion that the plaintiff, receiving full value for the land, it would, *ipso facto*, work a dedication thereof to the city; but that question was unimportant, as the plaintiff offered to convey to the city upon the payment of the value of the property.

In *Longworth v. Cincinnati*, 48 Ohio St. 637, a case decided during the pendency of this appeal, the action was to recover for a strip of land unlawfully appropriated for a public street without having the damages and benefits assessed according to law. The plaintiff in his petition offered to convey the same in fee-simple upon payment by the defendant of its value, and consented that a decree might be entered ordering a conveyance in fee-simple to the defendant. The court held that where land was appropriated for a street without having the damages assessed and paid, the owner, at his option, might either recover the land, or, where work in the line of street improvement had been done upon the premises

and the occupation of the street by the public would be interrupted, recover the value of the property.

The measure of damages in actions of this kind seems to depend upon the character of the injury. Where the injury is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to succeed to the plaintiff's title to the property, damages may be assessed upon the basis of its value. Where, however, the action is to recover for past injuries without recognition of the right of the defendant to continue the injury complained of, the recovery will be limited to a compensation for injuries already sustained: *Indiana etc. Ry Co. v. Eberle*, 110 Ind. 542; 59 Am. Rep. 225.

The injury complained of in this case was permanent and destructive. The shrubs, shade trees, and soil were removed therefrom and a street and sidewalk constructed, so that it was practically impossible to restore the property to its former condition. In addition to this, the rights of the public demanded its continuance as a public thoroughfare. This brings the case within the rule laid down in *Jones v. Gooday*, 8 Mees. & W. 146, cited in *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314, fixing the measure of damages at the value of the land, rather than the amount which would be required to restore it to its original condition.

The appellant cites and strongly relies upon the case of *Paret v. Mayor*, 40 N. J. L. 333. That was an action of *assumpsit* for the value of land taken for a public improvement without having the damages and benefits assessed. The case differs in some respects from the one before us, and also from the cases of *Soulard v. St. Louis*, 36 Mo. 546, and *Longworth v. Cincinnati*, 48 Ohio St. 637, in this, that no offer to convey the property to the municipality was made; and the suit being by an executor who had no power to transfer title, no stipulation could be incorporated in the decree to that effect. The reasoning of the case is, however, variant from the two cases referred to, the court holding that the scheme pointed out by the statute of having the damages ascertained is exclusive, and that where that cause is not followed the land-owner is remitted to the right of recovering his property with incidental damages as his sole remedy.

In our opinion the better reason and the weight of authority are against the position taken in *Paret v. Mayor*, 40 N. J. L. 333, and we decline to follow it. We, therefore, hold that

the court did not err in overruling the demurrer to the complaint.

We do not find it necessary to determine whether or not the court was in error in striking out the third paragraph of answer. The record shows that the court upon the trial admitted under the general denial all the evidence that could have been introduced in support of this paragraph. The fact that the evidence was admitted under the general denial would not of itself be sufficient to cure a wrongful holding on the motion to strike out: *Elliott's Appellate Procedure*, sec. 638; but as the evidence was admissible under the general denial, we may presume that this was the ground upon which the motion was sustained. The answer to interrogatories submitted to the jury show that the amount of the verdict was arrived at by deducting the value of the property of the appellees, with the improvement, from its value without the improvement. This method of arriving at the damages sustained by the appellees did not differ from that provided by statute regulating the assessment of damages and benefits: *Davis's Supp. to Rev. Stats. 1881*, 96, 97, sec. 3172.

If the city lost the benefit of having the benefits to other land-holders, on account of the opening of the street, assessed against them, it was the result of its own failure to proceed according to law, in no way chargeable to the appellees. That was a matter between it and the other land-owners affected by the change in which the appellees were not concerned.

The court did not err in holding the first paragraph of reply to the fifth paragraph of answer good on demurrer.

A cause of action cannot be said to have accrued until such time as the plaintiff can legally institute his action for relief: *Boswell's Limitations*, sec. 27.

Under the statute the regularity of the proceedings for condemnation, as well as the amount of the damages, was involved in the appeal and pending in the court. While this proceeding was pending in the circuit court, an independent action for the recovery of damages for the taking of the property would not lie: *Ney v. Swinney*, 36 Ind. 454; *Pittsburgh etc. Ry Co. v. Swinney*, 97 Ind. 586.

The appellees could not institute their action for the injuries complained of until the termination of the action pending. This action was brought within less than two years from the time the cause of action accrued.

The evidence sustains the verdict of the jury. We find no error in the record.

Judgment affirmed.

MUNICIPAL CORPORATIONS — POWER TO APPROPRIATE PROPERTY WITHOUT COMPENSATION. — A municipal corporation can no more take private property for public use without due compensation than a natural person can: *Nerins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392, and note; *Gardner v. Newburgh*, 2 Johns. Ch. 161; 7 Am. Dec. 526, and note, 534. Private property can be taken for a public street only upon making just compensation: *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622, and note. *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421, holds that private property may be appropriated to public use in connection with municipal regulations only upon the payment of just compensation. A city cannot seize property outside of its limits for a pesthouse without the owner's consent: See extended note to *Bloodgood v. Mohawk etc. R. R. Co.*, 31 Am. Dec. 373.

EMINENT DOMAIN — DAMAGES FOR TAKING PRIVATE PROPERTY FOR STREET, HOW ESTIMATED: See *Matter of Albany Street*, 11 Wend. 149; 25 Am. Dec. 618, and note.

ENGLISH v. ALDRICH.

[132 INDIANA, 500.]

MORTGAGES — JUDGMENT FORECLOSING JUNIOR MORTGAGE, WHEN DOES NOT BAR SENIOR. — When a senior mortgagee is made party defendant to an action by a junior mortgagee to foreclose, under a complaint calling in question only such liens as have accrued subsequent to the execution of the mortgage in suit, and the senior mortgagee simply files a general denial and allows judgment to be taken against him by default, a judgment therein adjudicating the mortgage sued on to be a prior lien does not bar the right of the senior mortgagee to foreclose his mortgage.

MORTGAGES — JUDGMENT FORECLOSING JUNIOR MORTGAGE WHEN OPERATES AS BAR AGAINST SENIOR MORTGAGEE. — When a senior mortgagee is made a party defendant to an action by the junior mortgagee to foreclose, under a complaint alleging that any lien held by such senior mortgagee is junior and subordinate to the mortgage in suit, and the senior mortgagee files a general denial, but fails to plead his senior mortgage, a judgment therein adjudicating that the mortgage sued on is senior to any lien held by him is a bar to his right to foreclose his mortgage.

MORTGAGES — JUDGMENT IN FORECLOSURE — WHEN EQUITY WILL NOT RELIEVE AGAINST. — When a senior mortgagee is made a party defendant to an action by the junior mortgagee to foreclose, under a complaint alleging that any lien held by the senior mortgagee is junior and subordinate to the mortgage in suit, such senior mortgagee has no right, as against the allegations of such complaint, to rely upon a statement made to him by counsel for the junior mortgagee that he is made a party simply to bar his equity of redemption under a judgment for costs held by him; and if, without pleading his senior mortgage, he allows the junior mortgagee to take judgment adjudging the mortgage of the latter to be the senior lien on the property, a court of equity will not set such judg-

ment aside as having been obtained by fraud or rendered through mistake of the court.

JUDGMENTS — WHEN EQUITY WILL SET ASIDE FOR FRAUD AND MISTAKE.

A court of equity possesses inherent power to set aside a judgment procured and entered by fraud practiced upon the court, or for a mistake made by it, but this power will only be exercised in clear cases, and when the party asking it is himself without fault, and when he proceeds without unreasonable delay after the discovery of the fraud or mistake.

J. S. Duncan and C. W. Smith, for the appellant.

J. Coburn, for the appellees.

COFFEY, J. This was an action by the appellant against the appellees to foreclose a mortgage upon certain described lots in Woodruff Place, in Marion County. It appears by the pleadings in the cause, as well as by the special findings of the court, that the mortgage which the appellant is seeking to foreclose was executed by James O. Woodruff to Daggy, Allen, and McClain, on the second day of October, 1872, to secure certain promissory notes therein described, and that it covered lots 71 and 106, in Woodruff Place. The appellant became the owner of the notes by assignment. On the fourth day of August, 1873, Woodruff sold and conveyed lot 71 to Nicholas R. Ruckle, who assumed the payment of one of the notes held by the appellant, as part of the purchase-price of the lot, and executed to Woodruff a mortgage back on the lot to secure certain promissory notes of that date executed for the balance of the unpaid purchase-price. These last-named notes were assigned by Woodruff to the appellees, John Beatty, John G. Mitchell, and William Beatty. On the twenty-fourth day of August, 1876, Beatty, Mitchell, and Beatty commenced their action in the Marion superior court against Ruckle, the appellant William H. English, and others, to foreclose the mortgage executed to secure the notes so assigned to them. The appellant was duly served with process. The allegations in the complaint so far as they related to the appellant were as follows: "The defendants, . . . William H. English (and others), have or claim to have some interest in or lien upon said mortgaged premises, accrued since the lien of said mortgage upon which this action is instituted." The prayer of the complaint was as follows: "Wherefore, the plaintiffs demand judgment as follows: 1. That each and all of said defendants and all persons claiming under them, or through them, or either of them, may be foreclosed of all equity of redemption, or other interest in said mortgaged premises."

After the service of process, the appellant placed the case in the hands of his attorneys, who called upon the attorneys for the plaintiffs in the case to ascertain why the appellant was made a party, and in response to an inquiry upon that subject they were informed that the appellant had a mere nominal interest in the suit, consisting of a judgment for costs, which was a junior lien on the mortgaged premises, and that he was for that reason alone made a party. Relying on this statement and the allegations contained in the complaint, the appellant, by his attorneys, filed a general denial to the complaint. Subsequently the cause was called for trial in the absence of the appellant's counsel, and he was defaulted and the cause tried by the court. The court adjudged and decreed that the mortgage then sued on was the first and paramount lien on the mortgaged premises. The property was sold by the sheriff and bid in by the appellees in satisfaction of their mortgage. The court finds that the failure of the appellant to set up his prior mortgage was owing to the mutual mistake of the attorneys in the cause growing out of the belief that the judgment for costs above mentioned was the only lien against the property held by the appellant at that time.

The appellant remained in ignorance of the fact that the decree affected his prior lien until December, 1879, and upon the discovery of the facts he at once endeavored to adjust the matter with the appellees, but never succeeded, but before any positive refusal on their part to adjust the matter this suit was instituted.

On the ninth day of October, 1877, Tillman A. H. Johnson, having become the owner of lot 106 in Woodruff Place, executed a mortgage thereon to the Indianapolis Savings Bank to secure certain notes therein described, and on the nineteenth day of December, 1878, said bank filed its complaint in the Marion superior court to foreclose said mortgage, making parties thereto the appellant and others.

In this complaint were the following allegations: "It is also alleged that the several defendants hereto have, or claim to have, some interest in or lien upon said mortgaged premises, but if any such interest, lien, or claim exists in behalf of them, or either or any of them, it is junior and subordinate to the lien of said mortgage."

The appellant was duly served with process, and thereupon referred the case to his counsel to look after and make his defense. Such counsel called at the office of the attorney

who brought the suit, and was shown an abstract of title, upon which appeared a small judgment for costs in favor of the appellant, which was a junior lien upon said lot, and was informed by the clerk in charge of the office that the appellant was made a party to the foreclosure suit in order to bar his equity of redemption under said judgment for costs, and for no other purpose.

Relying on said statement, and being ignorant that appellant had any other interest therein, his counsel, as a matter of form, filed an answer therein consisting of the general denial and a plea of payment.

Judgment was subsequently rendered in said cause, wherein it was decreed, as against the appellant, that the mortgage held by the bank was senior and paramount to any lien held by the appellant.

Within sixty days after the rendition of the decree the property was sold by the sheriff on a certified copy thereof. The court also found that the failure to set up the senior mortgage held by the appellant, in that suit, was the result of a mutual mistake between the attorneys of the appellant and the attorneys for the bank. The appellant remained ignorant of the terms of this decree and of the facts in the case for several years after the decree was rendered, but when he did learn the same he at once endeavored to adjust the matter with the bank, failing in which he instituted this suit.

The court found as a conclusion of law upon the foregoing facts that the appellant was estopped and barred by the decrees above mentioned from foreclosing his mortgage lien on either lot 71 or lot 106.

The assignment of error calls in question the correctness of this conclusion.

It is contended by the appellant that inasmuch as a court of equity possesses the inherent power to set aside or relieve a party from a judgment taken against him by a fraud practiced upon the court, or by the mistake of the court without the fault of the party against whom the judgment is rendered, the court should exercise that power in this case, and relieve him from the injurious effects of the decrees here involved.

It is undoubtedly true that a court of equity does possess the inherent power, independent of any statutory provision, to annul and strike from its records a judgment procured and entered by the perpetration of a fraud upon the court; and it is also true that many cases are to be found where such power

has been exercised as to judgments rendered by mistake: *Nealis v. Dicks*, 72 Ind. 374; *Freeman on Judgments*, secs. 484, 516; *Earle v. Earle*, 91 Ind. 27; *Cavanaugh v. Smith*, 84 Ind. 380; *Harman v. Moore*, 112 Ind. 221; *Nicholson v. Nicholson*, 113 Ind. 131; *Hogg v. Link*, 90 Ind. 346; *Weiss v. Guerinneau*, 109 Ind. 438; *Millspaugh v. McBride*, 7 Paige, 509; 34 Am. Dec. 360; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Keith v. McCaffrey*, 145 Mass. 18; *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393; *Partridge & Co. v. Harrow*, 27 Iowa, 96; 99 Am. Dec. 643; *Wilson v. Boughton*, 50 Mo. 17; *Tucker v. Whittlesey*, 74 Wis. 74; *Beatty v. O'Connor*, 106 Ind. 81; *Hamlin v. McCahill*, Clarke Ch. 249.

While the court possesses this power, it will not in all cases be exercised. It should be exercised only in clear cases, where the party asking it is himself without fault, and where he proceeds without unreasonable delay after the discovery of the fraud or mistake.

In this case the allegations in the complaints upon which the decrees in question were rendered are so different that they cannot, with propriety, be considered together. In the suit instituted by the appellees Beatty and others, it was alleged, as to the appellant, that he had, or claimed to have, some interest in or lien upon said mortgaged premises accrued since the lien of said mortgage upon which this suit was instituted; while in the suit brought by the bank it was alleged that the several defendants thereto had, or claimed to have, some interest in or lien upon said mortgaged premises; but if any such interest, claim, or lien existed in behalf of them, or either or any of them, it was junior to and subordinate to the lien or said mortgage.

It will be observed that the allegations in these two complaints differ in this material respect, namely: the first called in question such liens only as had accrued since the mortgage in suit was executed, while the second called in question all the liens held by the defendants and alleged that they were junior and subordinate to the mortgage in suit. No question is made as to the actual fact that the lien held by the appellant was senior to the liens which plaintiffs in those two suits foreclosed, and we are, therefore, met at this stage in the consideration of the case with the question as to whether these decrees, on their face, bar the right of the appellant to foreclose his senior lien. And first of the decree rendered in favor of Beatty and others.

Ordinarily, a party is bound by a judgment in the capacity in which he is sued, and in no other: *Davis v. Barton*, 130 Ind. 399.

The appellant was sued in the capacity of a junior lien-holder, but we do not deem it necessary to inquire, in this case, whether a decree could have been rendered in the cause binding him as senior lien-holder or not. He was not charged with holding a senior lien, but with holding a lien which had accrued since the execution of the mortgage in suit. When placed in possession of all the facts, so that we may construe the decree, we find this to be the fact. The complaint alleged the exact facts as they were known to the attorneys who drafted it, and they sought all the relief to which the plaintiffs in the case were entitled, for they were not entitled to foreclose their mortgage as against the appellant's senior lien.

In order to bar the appellant's right to redeem under his junior judgment for costs it was necessary to make him a party to the suit, and he was made a party for that purpose alone. The plaintiffs in that case had the right to foreclose their junior mortgage, buy in the property, and pay off the senior lien at their leisure, provided its holder or owner was willing to indulge them.

This decree must be construed with reference to those rights, the facts as they actually existed, and in connection with the allegations in the complaint.

The decree should not be construed in such a manner as to embrace matters upon which no issue could be made, unless such construction is absolutely necessary. No issue could have been made, or was in fact made, as to the senior lien held by the appellant.

We think the decree in this case should be construed as foreclosing all the liens held by the appellant junior to the mortgage therein foreclosed, and no other. To construe it as barring the senior lien held by the appellant would be to give it an effect never contemplated by the parties to the suit. The mortgage which the appellant now seeks to foreclose was in no way involved in that suit, and he was not called upon to set it up. For these reasons we are of the opinion that the facts found by the court do not bar his right to have the same foreclosed as against the appellees, Beatty, Mitchell, and Beatty.

The case of the savings bank against the appellant stands upon entirely different ground. In that case, the plaintiffs called in question all the liens held by the appellant, and al-

leged that they were subordinate to the lien of the mortgage then in suit. To protect his right to a senior lien, under these allegations, it was necessary to plead it. This he did not do, and, having failed in this regard, the decree rendered in the cause estops him from asserting that he held any such lien: *Masters v. Templeton*, 92 Ind. 447; *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; *Ulrich v. Drischell*, 88 Ind. 354; *Fitzpatrick v. Papa*, 89 Ind. 17; *Woodworth v. Zimmerman*, 92 Ind. 349.

Nor do we think the facts make a case calling for the exercise of the inherent power of a court of equity to set aside a judgment obtained by fraud or rendered through the mistake of the court. It is not claimed that any fraud was perpetrated upon the court, and the court certainly made no mistake. The appellant had no right to rely upon a statement of the clerk in the attorney's office as against the allegations in the complaint against him. The case falls within that class where the mistake is to be accounted the misfortune of the party rather than the wrong of his adversary, and one in which a strong case, indeed, must be made to warrant the interference of a court of equity: *Ratliff v. Stretch*, 130 Ind. 282; *Davis v. Barton*, 130 Ind. 399.

In our opinion the court did not err in its conclusions of law so far as they relate to lot numbered 106.

Judgment reversed as to the appellees Beatty, Mitchell, and Beatty, with directions to restate the conclusions of law as to them in accordance with this opinion, and to render a decree foreclosing the mortgage of the appellant as to lot 71 in Woodruff Place, and as to the other appellees the judgment of the Marion superior court is affirmed.

JUDGMENTS — FORECLOSURE OF JUNIOR MORTGAGE AS RES ADJUDICATA. One holding a senior mortgage, the superiority of which is not drawn in question by a bill to foreclose a junior mortgage is not divested of his prior right by the ordinary decree of foreclosure therein, nor will his superior right be placed in issue by making him a party to such bill and alleging therein that he claims title by deed or otherwise: *Buzzell v. Still*, 63 Vt. 490; 25 Am. St. Rep. 777. As to the general rule that a former judgment is conclusive only as to matters directly in issue in the former suit, see note to *King v. Chase*, 41 Am. Dec. 682, 683. On the other hand, where one is made a party to foreclosure proceedings, and has knowledge of facts that would protect his rights in said action, and fails to appear and assert his rights, but suffers default, he is bound by the judgment rendered in the foreclosure proceeding: *De Haven v. Musselman*, 123 Ind. 62.

RELIEF IN EQUITY AGAINST JUDGMENTS PROCURED BY FRAUD: See *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549; and notes to *Oliver v. Pray*, 19 Am. Dec. 603-612, and to *Greenwaldt v. May*, 22 Am. St. Rep. 662.

CITY OF FORT WAYNE v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO.

[132 INDIANA, 558.]

MUNICIPAL CORPORATIONS — LIMITATION OF RIGHT TO ALIENATE PROPERTY. — A municipal corporation possesses implied power to alienate or dispose of its property, real or personal, of a private nature, unless restrained by charter or statute, but it cannot dispose of property of a public nature in violation of the trusts upon which it is held.

MUNICIPAL CORPORATIONS — POWER TO ALIENATE PUBLIC PROPERTY BEFORE DEDICATION. — When property is purchased in fee-simple by a municipal corporation for a public use, it may alienate such property before it is dedicated to such use, but it cannot convey such property after it has been actually dedicated to a public use.

MUNICIPAL CORPORATIONS — POWER TO ALIENATE PROPERTY BEFORE DEDICATION TO PUBLIC USE. — Although a deed which vests the fee-simple to property in a municipality may be of such character as to dedicate it to a public use, yet when the deed vests such title in the city without limitation or restriction as to its alienation, the city may alienate it for a private use at any time before it is dedicated to a public use.

MUNICIPAL CORPORATIONS — ALIENATION OF PROPERTY BY — RESERVATION IN DEED. — When a city conveys land to a railroad company, and in the deed reserves the right to cross the railroad tracks with its streets when the city shall have made an addition thereto of certain land, it cannot enforce such reservation until it has made such addition. The reservation in the deed will not be extended beyond its express terms.

MUNICIPAL CORPORATIONS — POWER OF TO TAKE RAILROAD RIGHT OF WAY FOR HIGHWAY. — A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take part of the right of way of a railroad company by the construction of a public street thereon opened longitudinally.

MUNICIPAL CORPORATIONS — POWER TO DIVERT PROPERTY FROM ONE PUBLIC USE TO ANOTHER. When property is once dedicated to a certain public use, a city cannot take it for another and different public use without express legislative authority.

HIGHWAYS — RIGHT TO CONSTRUCT ACROSS RAILROAD TRACK. — Railroad companies or other private corporations acquire the right to construct roads, subject to the dominant right of the state to cross such roads whenever the public necessity demands that new roads or streets shall be opened; and the general power to open highways or streets carries with it the power to construct them across railroad tracks, subject to the limitation, however, that such crossing must be constructed at a point where the use of the highway will not deprive the railroad company of the use of its tracks.

EMINENT DOMAIN — APPROPRIATION TO PUBLIC USE — DIVERSION TO ANOTHER USE. — When land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with and which supersedes the former use, unless it appears, by express words or by necessary implication, that such is the legislative intent.

H. Colerick, for the appellant.

G. C. Green, O. G. Getzendanner, and J. H. Baker, for the appellee.

COFFEY, J. This was an action brought by the appellee against the appellant, the city of Fort Wayne, to enjoin the latter from opening a street across the yard and tracks of the appellee situated within the limits of the city. The material facts in the case, as they appear in the special findings of the court, are, that in the year 1866, the city of Fort Wayne acquired a tract of land in fee-simple, by purchase and deed, contiguous to the city, for the purpose of a public park. The deed to the city contained no limitation nor conditions as to the purpose for which the land was purchased or was to be used, nor did it contain any restrictions as to the power of the city to convey the same. On the twenty-third day of March, 1869, and before any steps had been taken to convert the ground into a public park, the common council of the city adopted a resolution by the terms of which it granted to the Fort Wayne, Jackson, and Saginaw Railroad Company twenty acres of the land off the west side of the tract, upon the condition that the railroad company should run its line through the tract so granted, and locate its depots for local purposes thereon, and also locate any shops it might find necessary to build at Fort Wayne upon the same tract; and upon the further condition that the property and the north-side addition to Fort Wayne should become annexed to and become a part of the city of Fort Wayne. The resolution further provided that when the railroad company had complied with the conditions of the grant the mayor of the city should execute to it a deed of conveyance for the land donated. The city also reserved the right to cross the tracks of the appellant whenever it should determine to lay off an addition composed of the remainder of the tract.

The donation of this land was made for the purpose of inducing the railroad company to make the city of Fort Wayne its southern terminus, and to induce it to locate its depots for local purposes and its shops thereon. Prior to February, 1871, the railroad company accepted the donation on the terms and conditions expressed in its resolution, took possession of the land, and constructed its road-bed through the same, put in side-tracks and switches, and erected a depot building thereon on the faith of the resolution, and located its yards on the

ground for making up its trains, storing cars, and conducting its business as a passenger and freight railroad, and prior to the twelfth day of March, 1872, had expended in so doing several thousand dollars. On the twelfth day of March, 1872, the common council of the city passed a resolution directing the mayor of the city to execute to the railroad company a deed for the land, which he accordingly did on the twenty-sixth day of the same month.

At the time the first resolution above referred to was adopted, one Edgerton was a member of the common council of the city of Fort Wayne, and he was at the same time vice president of the railroad company.

The common council consisted of sixteen members, nine of whom voted for the resolution and seven against it, Edgerton voting for the resolution; but when the last resolution, directing the mayor to execute the conveyance, was passed, Edgerton was not a member of the common council. On the eighth day of April, 1873, the common council of the city of Fort Wayne passed a resolution attempting to rescind both the resolutions above mentioned upon the alleged ground that the city had no power to bargain away the land therein described, and upon the alleged ground that the railroad company had not complied with the conditions of the grant. The resolution also required the city attorney to take such steps as might seem to him necessary to avoid the deed executed by the mayor of the city, but so far as appears no action was taken by him. On the thirty-first day of December, 1879, the Fort Wayne and Jackson Railroad Company succeeded to all the rights of the Fort Wayne, Jackson, and Saginaw Railroad Company, and on the twenty-fourth day of August, 1882, the Fort Wayne and Jackson Railroad Company leased all its property to the appellee for the period of one hundred years.

By a proceeding instituted for that purpose, regular on its face, the city of Fort Wayne, by its common council, has ordered an extension of Fourth Street in said city, so as to cross the yard and tracks of the appellants about 250 feet from the south end of the yard. In this proceeding the property was treated as belonging to the city of Fort Wayne, and for this reason neither the appellee nor the railroad companies from which it derives its title were made parties to the proceeding or given any notice thereof in any manner whatever. At the point where Fourth Street, if extended, will cross the appellee's yard it has six tracks used

for storing cars, weighing cars, making up trains, etc., and by opening Fourth Street as proposed it will prevent the weighing of cars, and will render the south end of the yard useless for the purposes for which it was constructed. On an average 140 cars are handled each day on these tracks, one half of which belongs to the Fort Wayne, Cincinnati, and Louisville Railroad Company, which uses this yard as its northern terminus. This latter railroad company has built round-houses and repair shops on the land donated as above by and with consent and aid of the city of Fort Wayne, and it has a contract with the appellee by the terms of which it uses the tracks and depot of the latter in the transaction of its business at Fort Wayne as its southern terminus, and without the use of this yard it cannot transact its business. The extension of Fourth Street will greatly discommode and diminish the business of the appellee and its yard and station grounds, and impair the value of its property and franchise. By reason of the number of tracks and their necessary use in moving trains and transporting and weighing freight-cars it will be dangerous to life and limb for the public to travel on said street extended across the appellee's yard as proposed. In constructing and preparing this yard and depot there has been expended about the sum of thirteen thousand dollars, and the use of this yard and station is necessary to the appellee in conducting its business at the city of Fort Wayne.

Upon these facts the court stated as a conclusion of law that the appellee was entitled to a permanent injunction enjoining the city of Fort Wayne from extending Fourth Street across its yard and tracks at the point described in the complaint.

The correctness of this conclusion is questioned by the assignment of error upon this appeal.

It is contended by the appellant that the conclusion of law stated by the court is erroneous for the reasons,—

1. That the city of Fort Wayne had no power to donate or convey the land in question for the purpose of a railroad, because it was purchased to be used by the people as a public park.

2. Because Edgerton, who voted for the donation as a member of the common council, was, at the time of so voting, vice-president of the railroad company, and that the donation was for that reason void.

3. Because the city, in its grant to the railroad company, reserved the right to cross its tracks.

The general rule is that municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute: 2 Dillon on Municipal Corporations, 3d ed., 569; *Shannon v. O'Boyle*, 51 Ind. 565; 1 Washburn on Real Property, 3d ed., 64; *Reynolds v. Commissioner etc.*, 5 Ohio, 204; *Beach v. Haynes*, 12 Vt. 15; *Jamison v. Popiana*, 43 Mo. 565; 97 Am. Dec. 414; *Board etc. v. Patterson*, 56 Ill. 111; *Platter v. Board etc.*, 103 Ind. 360; *Newbold v. Glenn*, 67 Md. 489.

Municipal corporations cannot dispose of property of a public nature in violation of the trusts upon which it is held, nor of a public common; but there is a distinction between property purchased for a public common and not yet dedicated, and property which is purchased for that purpose and actually dedicated to that use.

The case of *Beach v. Haynes*, 12 Vt. 15, is very much in point here. In that case land had been purchased for a public common, and it was so expressed in the deed of conveyance, but before it was actually dedicated to that use it was conveyed away by the town of Westford, in which was vested the fee-simple title, and it was held that such conveyance vested in the grantee a good title; but in the later case of *State v. Woodward*, 23 Vt. 92, it was held that a municipal corporation could not convey away a public common after it had been actually dedicated to the public use. Of course, the deed which vests title in the municipality may be of such a character as to dedicate the property to the public use, but such is not the case here. The deed to the city of Fort Wayne for the land in controversy vested in it the fee-simple title without limitation or restriction as to its alienation. Such being the case, we think the city had the power to convey it for private use at any time before it was dedicated as a public park. Such seems to be the tenor of all the authorities upon the subject.

We recognize the doctrine announced in the case of *Fort Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127, as sound, but in that case Rosenthal made a contract with himself, while here the contract was not between Edgerton and the city, but between the city and the railroad company. If that contract depended upon the vote of Edgerton, and there had

been no further action taken by the city council, we would have a question quite different from the one here presented, for in this case it appears by the findings of the court that a sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton, while the deed of conveyance was executed pursuant to a resolution passed by the common council at a time when he was not a member. Treating the first resolution as voidable on account of Edgerton's connection with its adoption, we think the subsequent action of the common council fully ratified it.

The adoption of these resolutions was not a judicial act, but was legislative or ministerial: *Platter v. Board etc.*, 103 Ind. 360.

We are unable to perceive how the reservation of the right to cross the tracks of the railroad company in the event the city of Fort Wayne should lay off an addition can have a controlling influence in this case, for it does not appear that the city has laid out any addition.

The general rule is that a reservation in a deed cannot be extended beyond its terms, and the right of the city to cross the railroad track is, by the terms of the reservation, limited to the time when the city shall elect to lay out an addition composed of the remainder of the land held by it under its purchase for a public park: *Nicholson v. Caress*, 45 Ind. 479; 2 Devlin on Deeds, sec. 979; *Jackson v. Hudson*, 3 Johns. 375; 3 Am. Dec. 500.

The question as to whether the city of Fort Wayne, under present legislation, possesses the power to appropriate the land described in its order for the extension of Fourth Street is one of much more difficulty. That there is a broad distinction between taking a part of the right of way of a railroad company for a public street by constructing the street longitudinally, and by taking it by crossing the right of way at right angles, seems to be too plain for controversy. The right to take longitudinally is quite different from the right of crossing, and is governed by entirely different rules. All the authorities are, we believe, to the effect that a municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take part of the right of way of a railroad company by the construction of a public street opened longitudinally. The decisions so holding rest upon the ground that where property is once

dedicated to a public use, it cannot be taken for another and different public use without express authority. It is not doubted, however, that the legislature may grant such authority. Private corporations acquire the right to construct roads, subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened, and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks: *Elliott on Roads and Streets*, 169; *Lake Erie etc. R. R. Co. v. Kokomo*, 130 Ind. 224; *State v. Easton etc. R. R. Co.*, 36 N. J. L. 181; *Morris etc. R. R. Co. v. Central R. R. Co. etc.*, 31 N. J. L. 205; *Baltimore etc. T. P. Co. v. Union R. R. Co.*, 35 Md. 224; 6 Am. Rep. 397; *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *St. Paul etc. R'y Co. v. Minneapolis*, 35 Minn. 141; *President etc. v. Village of Whitehall*, 90 N. Y. 21; *Albany etc. R. R. Co. v. Brownell*, 24 N. Y. 345.

While the construction of a street or other public highway across a railroad track is generally attended with some inconvenience to the company, yet it is not ordinarily inconsistent with the use of the railroad for the purposes for which it was constructed.

But even this rule, which allows the construction of streets and other public highways across railroad tracks, has its limitations.

They cannot be so constructed where by so doing the railroad would be unable to use its tracks at the point of the crossing for the purposes for which they were constructed. In other words, the crossing must occur at a point where the use of the highway or street will not deprive the railroad of the use of its tracks. Thus, in the case of *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510, it was said by the supreme court of Ohio: "But where land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with, and which, in the actual circumstances, must necessarily supersede the former use, unless such appear, by express words or by necessary implication, to be the legislative intent."

To the same effect is *Albany etc. R. R. Co. v. Brownell*, 24 N. Y. 345. In each of these cases there was an attempt to construct highways across the railroad tracks of the companies involved in the controversy.

It appears by the special findings in the case now under consideration that the extension of Fourth Street across the tracks and yards of the appellee will prevent the weighing of freight at that point, and will render the south end of the yard useless for purposes for which it was constructed; that it will greatly discommode and diminish the business, and its yard and station grounds, and impair the value of its property and franchise, and that it will be dangerous to life and limb for the public to travel over the street when so extended by reason of the number of tracks and the use to which they are necessarily put.

In view of these facts we are constrained to hold, under the authorities cited, that under present legislation the city of Fort Wayne is not authorized to extend Fourth Street in the manner contemplated. The use of such a crossing would be destructive of the use of the tracks of the appellee at this point in the manner they are now used. In such case the authority of the municipal corporation to make such a crossing must appear in some statute either expressly or by necessary implication.

Our attention has not been called to any such statute, and we know of none.

There are some other questions in the case of minor importance, but as we have reached the conclusion that the city of Fort Wayne is without power to make the crossing in dispute, they need not be noticed.

We are of the opinion that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

MUNICIPAL CORPORATIONS — POWER TO ALIENATE PROPERTY. — The power of a municipal corporation to convey property of all kinds differs in no essential particular from the power of a natural person under like circumstances: *State v. Laclede Gaslight Co.*, 102 Mo. 472; 22 Am. St. Rep. 789. The limitation on this power where property is held in trust for the public was recognized in *Trustees v. Mayor*, 33 N. J. L. 13; 97 Am. Dec. 696; *San Francisco v. Itsell*, 80 Cal. 57.

EMINENT DOMAIN. — As to the condemnation of corporate property for public uses, see extended note to *Appeal of Sharon Railway Co.*, 9 Am. St. Rep. 137-147. That the right to exercise the power of eminent domain must be conferred by clear and express terms, or by necessary implication, see pages 142-144 of that note; to the same effect, see *In re Mayor of New York etc.*, 135 N. Y. 253; 31 Am. St. Rep. 825. A railroad company cannot convert its right of way into storeroom for its cars and call it a "yard," and thus prevent a street from crossing its right of way: *Commissioners v. Detroit etc. Ry Co.*, 93 Mich. 58.

CASES
IN THE
SUPREME COURT
OF
IOWA.

CONSOLIDATED TANK LINE COMPANY *v.* HUNT.

[83 IOWA, 6.]

EXEMPTIONS—LABORER, WHO IS.—One who is the head of a family and who earns his living by the sale of oils at retail from a tank wagon, sometimes driven by himself and sometimes by his minor son, is a laborer who habitually earns his living by the use of a team and wagon, and he is entitled to hold them as exempt from execution, although he also makes small and infrequent sales of oil from his storeroom.

W. W. Morsman, for the appellant.

Clark and Hill, and J. R. Good, for the appellee.

GRANGER, J. The testimony gives support to the following facts: That the defendant is a resident of Page County, Iowa, a married man, and the head of a family; that prior to March, 1889, he was engaged in selling oils and gasoline at Clarinda, Iowa; that after that he was engaged in a retail trade of those articles, having a place of business known as headquarters in the back room of a building on the north side of the square in Clarinda; from these "headquarters" for a time he delivered his sales in an ordinary wagon, and afterward from the wagon in suit, known as a "tank wagon." The wholesale trade was discontinued June 27, 1889, for which trade his oils had been stored near the depot. After the discontinuance of the wholesale trade, his oils for the retail trade were stored at and delivered from the "headquarters." A few sales were made, including the delivery, at the headquarters; but the general business was carried on by orders being left at headquarters to be filled about the city from the tank wagon, and in some cases cans would be set out by the cus-

tomers, and these were also filled from the wagon. At times the oils would be paid for at headquarters, but generally at the place of delivery. The team for the purpose of delivering the oils was sometimes driven by the defendant in person, and sometimes by his minor son, sixteen years of age. At times both were with the team. The evidence favors the view that most of the time the son was with the team and delivered the oils, but performed such service for his father.

The oils were received at headquarters in quantities of from three to five barrels at a time. The team, harness, and wagon were used by the defendant in this business, and the business is the defendant's means of earning a living. The appellant insists that the facts do not sustain the action of the court. His counsel states his view of the law in these words: "In my judgment the right has been clearly defined by statute, and under the statute, in order to maintain the exemption, the debtor must show that he is a teamster or other laborer, who by his personal use of the property habitually earns his living."

The statute to be construed is as follows: "If the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution the following property: . . . the horse or team, . . . the wagon or other vehicle, with a proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer, habitually earns his living." It is conceded on authority that the statute is to receive a liberal construction. It would be a grave disregard of the concession were we to hold to the view, claimed by the appellant, that because the team was driven by the son, though for the father, the debtor, he is not within the provisions of the law as to exemptions. Let us suppose one who is a laborer or teamster, and earns his living by the personal use of his team is disabled, we will say, totally, and a minor son, by the use of a team, supports the family. Will it be said that the owner, if a debtor, loses his right of exemption? Confining ourselves to the literal definition of the word "laborer" or "teamster" as quoted in argument, such a result might follow; but, looking to the law and the purposes of its enactment, there is no difficulty in saying that such a case is clearly within its purview, and that the debtor would come within the statutory meaning of the word "teamster" or "laborer." If a widow, who is the head of a family, and also a debtor, owns a team, by the use of which her living

is supplied, may she be divested of this means of earning a living merely because she does not in person perform the labor of driving the team? These plain propositions pave the way to clearly observe the legislative purpose.

It is strenuously urged that the defendant is not a teamster nor laborer, but a merchant, and as such is not entitled to the exemption. It is true the defendant is engaged in a small way in the sale of merchandise. He has a back room of a building, used more for storage than for any other purpose, which is a base of supplies for his delivery system or business, and the business is carried on mainly by the use of the team, and it is manifest that, without the use of the team, he has no business to supply a living; for he says that the profits of completed sales at the headquarters would not pay his rent. Any person thus engaged in receiving and distributing oils must be said to be a laborer. He "is one who labors in a toilsome occupation." The use of the team is necessary to carry on the occupation, and hence, if the occupation supplies his living, he earns his living by the use of his team. That the living is not wholly so earned is not material. The same exemption, upon the same conditions, is made to the physician, public officer, and farmer, in which cases it will be readily understood that the use of the team would be but an aid to the profession or calling. If a physician may have the exemption as an aid to the business of his profession by which he obtains a living, why may not the laborer, one who chops the wood in the forest, or quarries the rock from the hillside, to be put by the use of a team on the market, to supply his living, have the same protection? The fact that the laborer utilizes his efforts in the way of an independent rather than a dependent business, should not operate to his disadvantage. This is the situation of the defendant. If he employed another to do the work of receiving the oils, replenishing the tank, and delivering about the city, the employee would without question be a laborer. The defendant is not less so merely because he directs and owns the business, besides performing the labor.

The district court must have found from the evidence that the defendant was within the statutory meaning a teamster or laborer, and that finding is conclusive upon us, unless the record affirmatively shows the court in error, and we do not think it does. The case of *Root v. Gay*, 64 Iowa, 399, supports our conclusion.

Judgment affirmed.

EXECUTIONS — EXEMPTIONS OF LABORERS. — For definitions of “teamster” and “laborer” under the California Code, see *Brusie v. Griffith*, 34 Cal. 302; 91 Am. Dec. 695. A stenographer’s wages are exempt under the code of Georgia, which enumerates, as exempt, the wages of all “journeymen, mechanics, and day-laborers”: *Abrahams v. Anderson*, 80 Ga. 570; 12 Am. St. Rep. 274; but an agent who sells goods by sample is not within the meaning of a statute, which exempts the wages of a “laboring man or woman from seizure”: *Weldner v. Ferguson*, 42 Minn. 112; 18 Am. St. Rep. 495. The doctrine referred to by the court in the principal case, that the exemption may take effect though the person’s living is not wholly earned by means of the exempt article, is illustrated by the ruling in *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158, where it was held that the amount of time which the debtor devotes to his business is immaterial in determining whether he is entitled to claim property as exempt on the ground that it is being used in that business. As to what articles are exempt as being “necessary tools or instruments,” see references to cases in the note to *White v. Gemeny*, 27 Am. St. Rep. 321.

CASS COUNTY BANK v. WEBER.

[83 IOWA, 63.]

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE. — When a wife, having money in her own right, gives it to her husband for general use without any agreement or expectation that it is a loan and without any obligation for its repayment, the transaction cannot generally in later years be made the means of protecting the insolvent husband’s property against his creditors. In such cases the transaction will generally be deemed to have been made without consideration, and for the purpose of hindering, delaying, and defrauding creditors.

HOMESTEAD — PARTIAL USE OF BUILDING AS HOME. — When a homestead claimant uses a particular building as a home, the whole of such building, in cases of controversy, will be presumed to constitute and be a part of the homestead, until it is shown by the adverse party that some specific portion is not of the homestead character, and, therefore, not exempt.

HOMESTEAD — PARTIAL USE OF HOTEL AS. — When a two-story building is used in part as a homestead and in part as a hotel, and the rooms on the first floor used for hotel purposes are also used by the family as a passage-way between rooms occupied as a home and for ingress and egress to the building, and the second story of the building, though used exclusively for hotel purposes, is inaccessible except through that part occupied as a homestead, the whole building must be treated as a homestead, and therefore declared exempt from execution.

ACTION to set aside a conveyance from husband to his wife as in fraud of plaintiff’s rights as a judgment creditor. On November 20, 1886, the plaintiff recovered a judgment against George Weber for \$668.81. On April 15, 1885, George Weber executed a deed of conveyance to his wife to eighty acres of land, and four lots in the city of Atlantic. The deed to her

was in consideration of money held by her in her own right and previously loaned by her to her husband for his general use, without any agreement for its repayment. The four lots in the city of Atlantic are claimed by Mrs. Weber as a homestead. Judgment for plaintiff, and the defendants appeal.

L. L. De Lano, and Willard and Willard, for the appellants.

Temple and Phelps and C. F. Loofburrow, for the appellee.

GRANGER, J. 1. This case, as to its facts in detail, is like many another where a wife has money in her own right which she gives to her husband for general use, without any agreement or expectation that it is a loan, or creates any obligation for payment, until in later years, when, through the vicissitudes of fortune, the transaction is made a means of protecting her husband's property against his creditors. From the evidence, though quite conflicting in many respects, the district court found that the conveyance was without consideration and for the purpose of hindering, delaying, and defrauding the creditors of George Weber; and, after considering the evidence, we concur in its conclusion.

2. The more difficult question in the case is that of homestead exemption. The property claimed as a homestead is that in the city of Atlantic, lots 9, 10, 11, and 12. These lots have each a frontage of 25 feet and a depth of 140 feet. On lot 12 there was originally built a brick building, with the first floor designed for a business-room and living-rooms above. The property was afterward sold to Dierkson and Hansen, who converted it into a hotel known as the "Farmers' Home." The first story was made into two rooms, the first being used as an office and bar-room, and the other as a dining-room. This building is fifty feet in length by twenty-two feet in width. The second story is reached by a stairway from the front room or office. Underneath is a cellar, access to which is by a stairway from the dining-room. North, and, as we understand, on the side of this brick building, was built a frame addition, with kitchen and bedroom. Other frame additions were also made to the brick building, in which were a sitting-room and bedroom on the ground floor and bedrooms above. Between the sitting-room and the dining-room was a wash-room, through which access was had from the brick part to the bedroom, and through the wash-room and bedroom into the sitting-room, the sleeping-rooms in this part being over the sitting-room. It thus appears that the district court found

that the parts of the building not occupied as a homestead are, of the brick part, the upper rooms, and the front room below, used as the office, and the cellar beneath; also the bedroom east of and between the sitting-room and wash-room in the frame part, as by its decree the plaintiff's judgment is made a lien thereon. We regret that the condition of the record leaves some uncertainty as to these particular facts. We have endeavored, however, to be precise in our findings. On the rear end of lots 10, 11, and 12, and on lot 9, there were erected some stables for the use of the hotel, and after Weber purchased the premises he built on the lots at the rear end a frame business house. The stabling was used by the defendants for the purpose of carrying on their business of hotel-keeping, and neither that nor the frame business house was used as a part of the homestead, and the district court thus found.

Our findings of fact as to the homestead occupation do not exactly accord with those of the district court. That the defendants had a homestead in the premises is not questioned. Hence, we are not to inquire whether or not there is a homestead, but, conceding one, we inquire after its intent. In *Rhodes v. McCormick*, 4 Iowa, 368, 68 Am. Dec. 663, it is said: "When an execution defendant shall use a particular building as a home, the whole of such building, in cases of controversy and disagreement, will be presumed to constitute and be a part of the homestead until it is shown by the party adversely interested that some specific portion is not of the homestead character, and, therefore, not exempt." As to the office-room, the bedroom, and the cellar, we have no difficulty in reaching a conclusion that they are not brought within the rule. The most that can be said is that there is shown to be, to some extent, a joint occupancy of them for homestead and hotel purposes. Of the bedroom it is true that it was used as a sleeping-room for the guests of the hotel, but at the same time it was used by the family as a passage-way from the dining-room to the sitting-room, both of which were found to be parts of the homestead. Now, let us suppose the bedroom had not been used for a sleeping-room by any person, but merely a room through which the family passed to the sitting-room from other parts of the house. We do not think that state of facts would justify a finding that it was not used as a part of the homestead, nor do we think the mere fact of its use by guests of the hotel, while at the same time used for the

other purpose, would divest it of its character as a part of the homestead. The front or office-room was used as an office and bar-room, but it was at the same time used by the family. It was a means of ingress and egress from the street. It was a front room, back of which was the dining-room, and still back the wash-room, bedroom, and sitting-room. These rooms were all devoted to the same purpose. At least, it does not appear that they were not, and we assume facts not otherwise established in harmony with the homestead right. It is not as if it was shown that one story of the building was used as a store or shop, or leased and occupied by a stranger, which use would indicate of itself a disuse by the family. The entertainment of hotel guests and of boarders is often in a manner to be consistent with an occupation at the same time by the family of the apartments as a part of the home. Such entertainments would, it is true, often, if not generally, be a limitation upon the use by the family of certain apartments, but not to the extent of exclusion. If the office-room had not been thus used, but had been a room into which the family occasionally went, and through which it passed from the other apartments to and from the street, we do not understand that it would, from such a state of facts, be so divested of a homestead character as to be liable to execution. Neither will the fact that it is so used in connection with another use have such an effect. The same is true of the cellar. It was used for hotel purposes, but also for the family. The business of the hotel and the support of the family as to work and supplies, as well as occupation, were so mingled naturally that it is a task of much difficulty to show separate occupations or use, and the burden of doing so is with the plaintiff.

The upper story of the brick building is divided into five sleeping-rooms, and these (the record shows) were used exclusively for the guests of the hotel, and not by the family for homestead purposes; that is, they are a part of the homestead building, but not particularly occupied by the family. The legal problem in this respect, in the light of authority, is somewhat difficult. Following the rule of *Rhodes v. McCormick*, 4 Iowa, 368; 68 Am. Dec. 663; *Mayfield v. Maasden*, 59 Iowa, 517; and *Johnson v. Moser*, 66 Iowa, 536, that apartments of the homestead building, not occupied as such, are liable to execution, and we should find for the plaintiff; and under these authorities our duty would be clear but for the fact that in this case the only means of access to these rooms is through

the office-room, which we hold to be a part of the homestead, and we possess no authority to invade the homestead right by continuing the present means of access, unless we extend what is now by many regarded as a rule of doubtful merit—that of partitioning a homestead building between a debtor and his creditors, which we are not inclined to do. It would, of course, be idle to hold that a room or rooms in a building not used by the family were liable to execution, when the purchaser would have but a barren right—the title without a right of occupancy or use; and that, so far as disclosed by the record, would be the situation in this case. In *Johnson v. Moser*, 66 Iowa, 536, the homestead was limited to the two middle stories of a four-story building, and a right of access was given to the fourth story by hatchways through the floors of the homestead part, and a hoisting apparatus connected with the fourth story. This means of access, it seems, was a part of the plan of constructing the building, and could be continued without any interference with the occupation of the homestead part of the building. It was, in effect, an independent means of access, and the hatchway could never have been regarded as a part of the homestead. It was, therefore, an invasion of the homestead right. The difference between that case and a right of access to these rooms through the front room below is too obvious to deserve notice. Such a right would be a serious impairment of the homestead privilege. For reasons certainly not stronger in *Wright v. Ditzler*, 54 Iowa, 620, a room used as a store-room for the sale of merchandise was distinguished and held exempt from execution. Its sale would have interfered with the use and occupation of the living-rooms above and cellar below. A similar thought is made use of in *Johnson v. Moser*, 66 Iowa, 536, in holding that parts of the building might be sold. It is said: "Their sale will not unreasonably interfere with the use of the defendant of those portions of the building which he occupies as a place of residence." The same cannot be said of this case, with a right of access as it now is. These considerations lead us to the conclusion that the entire building should be treated as exempt from execution under the homestead law, and that the decree of the district court should be thus modified.

3. A point is made in argument that the defendant, George Weber, was only surety for one W. H. Kreamer on the note on which the plaintiff's judgment was obtained, and that the plaintiff has alleged, but has not proven, the insolvency of

Kreamer. Without an intimation as to the law applicable, we think the fact is otherwise. With the additional abstract, we think the insolvency appears.

The decree of the district court is approved, except as to the modification suggested.

Modified and affirmed.

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE. — Where a wife has loaned money to her husband and taken his note therefor, he has the right to prefer her to the exclusion of other creditors: *Laird v. Davidson*, 124 Ind. 412; but where a wife has from time to time received various sums of money as her separate property, a portion of which went into her husband's hands, but without any stipulation as to repayment, and no interest was asked or received, and no accounting had in respect thereto until the larger part of it was barred by limitation, the moneys so coming to the husband's hands will not form a sufficient basis to sustain a conveyance by him to the wife as against the rights of the creditors: *Coale v. Moline Plow Co.*, 134 Ill. 350.

HOMESTEAD — WHAT OCCUPANCY WILL SUPPORT THE CLAIM OF EXEMPTION. — This subject is discussed in the extended note to *Pryor v. Stone*, 70 Am. Dec. 348-350. The doctrine of the Iowa court, as laid down in the authorities cited in the principal case, is there stated to be at variance with that of other states. Additional cases to the point that the partial use of a building for business purposes will not deprive the owner of the benefit of his exemption are *Heathman v. Holmes*, 94 Cal. 291; *King v. Welborn*, 83 Mich. 195; *Orr v. Shraft*, 22 Mich. 260; *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *Stanton v. Hitchcock*, 64 Mich. 316; 8 Am. St. Rep. 821. The decision in the principal case brings the courts of Iowa more nearly in line with those of other states, but it is perhaps open to question whether the reason given for including the entire building in the homestead in this particular instance is satisfactory. The mere circumstance that, under the existing arrangements of the house, the only passage to the upper story lay through rooms occupied for a homestead, seems immaterial. If the law, independently of such a circumstance, would subject the upper story to the claims of creditors, it may fairly be argued that a principle analogous to that by which a "way of necessity" arises in grants of land should be applied in their favor. In the case of a house like that in question, it can hardly be supposed that some external stairway could not have been constructed without interfering with the homestead. Where a building has several stories, such a simple solution of the difficulty might be impossible, but even if it should be necessary to apply a part of the homestead to the purpose of furnishing a passage, such a course would certainly seem more consistent with justice than one which would enable a debtor to keep possession of several upper stories by the easy method of making the rooms of the homestead portion of the building the only available passage-way. We venture to think that this is scarcely a proper test by which to determine the relative rights of the parties.

BIGELOW v. BURNHAM.

[83 IOWA, 120.]

NEGOTIABLE INSTRUMENTS — CONFLICT OF LAWS — USURY. — When a note purports on its face to be made in one state, though it was in fact made and delivered in another, where the payee resided, it will be presumed to be payable in the state where it purports to have been made, and if valid under the law of that state will not be deemed to be void because it provides for usurious interest under the law of the state where it was in fact made, in the absence of evidence as to where the indebtedness for which it was given was incurred, or where the consideration was delivered, or of any agreement as to the place of payment.

NEGOTIABLE INSTRUMENTS — CONFLICT OF LAWS. — The law of the place where a contract or a note by its terms is to be performed or paid determines its validity.

NEGOTIABLE INSTRUMENTS — CONFLICT OF LAWS. — The date and place of execution of a promissory note which appear on its face, and not by memorandum entered thereon, raise the presumption that it is payable at that place, and permits it to be enforced under the law prevailing there.

NEGOTIABLE INSTRUMENTS — CONFLICT OF LAWS — INTEREST. — When a contract or note is made in one state to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other, the parties will be presumed to contract with reference to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it is a *bona fide* transaction, the contract will be sustained; and if a device for securing usurious interest, it will be held void.

Nagle and Birdsall, and T. D. Higgs, for the appellant.

C. A. Irwin and William Milchrist, for the appellee.

BECK, C. J. 1. The promissory note is in the following language: —

“STORM LAKE, BUENA VISTA Co., IOWA.

“For value received I promise to pay Rufus Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents, within one year from date, with interest at seven per cent. May 2, 1885. ROLLIN BURNHAM.”

The answer of the defendant admits the execution of the note in suit, but alleges that it was executed and delivered in the state of New York, and that under the laws of that state it is usurious and void. The statutes of New York declare that all notes and other contracts providing for the payment of interest at a rate greater than six per centum per annum shall be void. The evidence shows that the note in suit was signed in New York and delivered there, and that the plain-

tiff at the time, and both prior and subsequently thereto, resided, and still does reside, in Storm Lake, in this state, and the payee of the note resided in New York. It is not shown where the indebtedness was incurred for which the note was given, nor where the consideration therefor was delivered to and received by the plaintiff, nor was there any evidence showing an agreement for the payment of the note at any specified place. The only facts upon which the case was decided are that the note was executed in New York, and that the payee resided in that state.

2. It is a settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity: *Butters v. Olds*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Burrows v. Stryker*, 47 Iowa, 477; Story on Conflict of Laws, secs. 242, 280, 281; *Andrews v. Pond*, 13 Pet. 65; 2 Parsons on Bills and Notes, 320.

3. The date and place of execution of a promissory note, which appear on its face, and not by mere memorandum entered thereon, raise the presumption that it is payable at that place. The reason of this rule is based upon the fact that the mention of the place is always intended to show that the note was executed there, just as the entry of the date is intended to show the day of execution. In business affairs, and the general affairs of life, the date of an instrument, and the place named in connection with the date, are written thereon, in order to show the day and place of its execution. The law will raise a presumption in accord with this uniform custom of men generally. The place named in a promissory note as the place of execution is usually the place of residence or business of the maker of the paper, and is embodied in the note to show where it may be presented for payment. It follows that the law raises a presumption upon the face of the note of an agreement that it is payable at the place indicated as the place of its execution, and permits it to be enforced under the law prevailing there: 1 Parsons on Bills and Notes, 1st ed., 441, 442; *Bullard v. Thompson*, 35 Tex. 313; *Orcutt v. Hough*, 54 N. H. 472; *Ricketts v. Pendleton*, 14 Md. 320.

4. It will not do to presume that the parties entered into a contract which is void under the laws of New York, and that they intended that it should be subject thereto. Such presumption would charge them with the folly or the fraud of entering, with their eyes open, into a void contract. Men are not presumed by the law to act in folly or in dishonesty, but

rather that they intended in good faith that their acts shall be valid, and what they purport to be. Nor will we by presumption bring the case under the usury law of New York, which is penal in its effects: *Bullard v. Thompson*, 35 Tex. 313; *Thompson v. Powles*, 2 Sim. 194.

5. When a contract is made in one state, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other state, the parties will be presumed to contract with reference to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it be a *bona fide* transaction, the contract will be sustained; if a device for securing usurious interest, it will be held invalid: *Scott v. Perlee*, 39 Ohio St. 63; 48 Am. Rep. 421; *Newman v. Kershaw*, 10 Wis. 333; *Fisher v. Otis*, 3 Chand. 83; *Richards v. Globe Bank*, 12 Wis. 692; *Hosford v. Nichols*, 1 Paige, 220; *Pratt v. Adams*, 7 Paige, 615; *Flanning v. Consequa*, 17 Johns. 511; 8 Am. Dec. 442; *Townsend v. Riley*, 46 N. H. 300; *Arnold v. Potter*, 22 Iowa, 194; *Butters v. Olds*, 11 Iowa, 1. See note to *Martin v. Johnson*, 84 Ga. 481.

6. It appears that the rule as to the law of contracts made in one state to be performed in another, is modified or softened when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce: See Daniel on Negotiable Instruments, sec. 922, and cases cited; 2 Parsons on Contracts, 94, sec. 5, and cases cited. *Hart v. Wills*, 52 Iowa, 56, 35 Am. Rep. 255, is not in conflict with our conclusions in this case, the note in that case being held to be an Iowa contract upon grounds not inconsistent with our decision in this case.

On the ground that the note upon its face will be presumed to be payable in Iowa, and in accord with other doctrines stated, we reach the conclusion that the judgment of the district court ought to be reversed.

NEGOTIABLE INSTRUMENTS — CONFLICT OF LAWS. — The general rule is that negotiable instruments are governed by the law of the place where they are expressly made payable: *City of Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413; *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147; *Emanuel v. White*, 34 Miss. 53; 69 Am. Dec. 385; *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; but the contract may provide that it is to be construed according to the laws of the state where the note is made, and in that case the full amount of the legal interest in such state may be recovered, though higher than the legal

interest in the state where the note is payable: *New England etc. Co. v. McLaughlin*, 87 Ga. 1. Where usury is pleaded, deeds of even date with the note, and executed to vest title in the lender as security for the loan, are admissible in evidence for the plaintiff to show the intention of the parties as to the real *situs* of the contract, and to what state or country they had reference in fixing the rate of interest: *Jackson v. American etc. Co.*, 88 Ga. 756.

CHAPIN v. BROWN.

[83 IOWA, 156.]

CONTRACTS — RESTRAINT OF TRADE. — Although agreements in general restraint of trade are void as against public policy and as creating monopolies, yet an agreement in partial restraint of trade will be upheld when the restriction does not go beyond some particular locality, is founded upon sufficient consideration, and is limited as to time, place, and person.

CONTRACTS — RESTRAINT OF TRADE. — One engaged in business may sell his stock in trade and good-will, and make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract.

CONTRACTS — RESTRAINT OF TRADE — CONSIDERATION — PUBLIC POLICY. — An agreement entered into by all the grocers of a certain town by which they agree in favor of a third person, and without receiving any money or other consideration, to quit the business of buying and selling butter for two years, and such third person agrees to carry on that business exclusively for the same period of time, is void for want of consideration, and is also against public policy as creating a monopoly and destroying competition.

ACTION to recover damages and for an injunction. The opinion states the facts. Judgment for the defendants and the plaintiffs appeal.

T. H. Chapman and C. A. Irwin, for the appellants.

T. D. Higgs, for the appellees.

ROTHROCK, J. It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement: —

“We, the undersigned grocerymen of Storm Lake, finding the business of purchasing butter of farmers and handling the same very burdensome and of material loss to us, and believing the same could be handled as advantageously by persons who would make butter buying and handling an exclusive business, and whereas the firm of D. and E. Chapin,

through their agent, assure us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement, and pledge ourselves to each other and to the said firm of D. and E. Chapin, that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however, shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. and E. Chapin, in whose favor we abandon the business, shall open rooms conveniently located for buying butter; that they shall keep a man in attendance during all business days and hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might seem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. and E. Chapin shall not direct their checks or persons taking the same to any particular store for payment; that they shall not buy in connection with any dry-goods or grocery store. Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dissatisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting, a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and void. This engagement shall take effect and be in force from and after such time as when it shall have been subscribed to by each grocery house in this town, and when the firm of D. and E. Chapin shall designate, pro-

vided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. and E. Chapin, provided said firm shall fix as high price as eggs are at the time worth to ship.

W. C. KINNE & CO., GEO. E. FORD & BRO.,

FRED SCHOLLER, W. LOWNSBERRY,

BROWN BROS., LIBBY & RAE,

J. O. DOUGLAS, D. & E. CHAPIN."

W. A. JONES,

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with the plaintiffs' business, and alienated their trade to the extent of five thousand pounds of butter, upon which the plaintiffs would have realized a profit of three cents a pound, making in all one hundred and fifty dollars damages suffered by the plaintiffs. Judgment is demanded for said sum, and an injunction is prayed, restraining the defendants from continuing in said business.

Among the several grounds of objection to the granting of an injunction we regard two of them as material. They are as follows: "1. That the agreement in writing is void for want of consideration, as there is no money value inuring to the benefit of the defendants herein; and 2. That said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is, therefore, in restraint of trade, to the detriment of the producers and consumers of butter at that place and in that vicinity."

The history of the law upon the question of contracts in restraint of trade is an interesting subject of investigation. The books abound in cases upon the subject. Anciently all contracts were void which in any degree tended to the restraint of trade, even in a particular locality, and for a limited time. This ancient rule has been so far modified that, although agreements in general restraint of trade are invalid, because

they deprive the public of the services of the citizen in the occupation or calling in which he is most useful to the community, and expose the people to the evils of monopoly, and prevent competition in trade, yet an agreement in partial restraint of trade will be upheld where the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place, and person. It is accordingly everywhere now held that when one engaged in any business or occupation sells out his stock in trade and good-will he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. This is about as far as contracts in restraint of trade have been upheld by the courts in this country or in England. The general principles above announced will be found in all text-books upon contracts, and find support in many adjudged cases. We have not thought it necessary to set out or cite the cases. They will be found collected in the third volume of the American and English Encyclopedia of Law, page 882, and the same, volume 10, page 943; 2 Parsons on Contracts, page 747.

Applying these rules to the contract under consideration, we are to inquire first whether there is a sufficient consideration for the promise of the defendants and the other parties who executed the instrument not to engage in dealing in butter at Storm Lake. It is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor for the good-will of any business. So far as appears they went into the town of Storm Lake and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. In all the search we have made for authority upon this branch of the controversy we have found no warrant in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations; but such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry-goods merchants of Storm Lake

that if they would all quit the business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry-goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

2. But it appears to us that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced.

Affirmed.

CONTRACTS IN RESTRAINT OF TRADE: See, generally, notes to *Pike v. Thomas*, 7 Am. Dec. 743-746; *Angier v. Webber*, 92 Am. Dec. 751-765; *Smalley v. Greene*, 35 Am. Rep. 269-272; *Tardy v. Creasy*, 59 Am. Rep. 686-693. As to the necessity of a consideration, see *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Kellogg v. Larkin*, 3 Pinn. 123; 56 Am. Dec. 164; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816. A limitation as to time merely will not invalidate the contract if in other respects reasonable: *Bowser v. Bliss*, 7 Blackf. 344; 43 Am. Dec. 93; *Webster v. Buss*, 61 N. H. 40; 60 Am. Rep. 317. The limitation as to space must not be greater than the due protection of the party for whose benefit the contract is made demands: *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380. Therefore a contract not to carry on a trade or business in a particular town or county is valid: *Grundy v. Edwards*, 7 J. J. Marsh. 368; 23 Am. Dec. 409; *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; while on the other hand an agreement in restraint of trade throughout an entire state is void: *Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621. That contracts tending to stifle competition and create monopolies are void: See *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Santa Clara Valley Mill etc. Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; *Texas etc. R'y Co. v. Southern Pac. R'y Co.*, 41 La. Ann. 970; 17 Am. St. Rep. 445; *People v. Chicago Gas etc. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690.

GORDON v. ANDERSON.

[83 IOWA, 224.]

NEGOTIABLE INSTRUMENTS — CERTAINTY OF PAYEE. — A note payable to a certain person named therein, "*et al.* or order," is non-negotiable.

ACTION by an assignee for value, and before maturity, of two mortgage notes, executed by the defendants and payable to "Charles R. Whitesell *et al.*, or order," and to foreclose a mortgage given to secure them. The defendants answered, alleging a breach of warranty in the deed to the property for which the notes in suit constituted part of the purchase-price, and praying damages as an offset against the notes. The plaintiff demurred to the answer on the ground that it set up no defense as against him, he being an innocent purchaser of the notes for value before maturity. The demurrer was sustained, and defendants refusing to plead over, judgment was rendered for plaintiff, and they appealed.

H. Scott, and Howell and Son, for the appellants.

Craig, McCrary, and Craig, for the appellee.

GIVEN, J. 1. The discussion is addressed entirely to the question whether the promissory notes sued upon are negotiable. It will be observed that they are promises "to pay to Charles R. Whitesell *et al.* or order." The discussion is as to the construction to be given to the words "*et al.*," and the effect thereof. The words as here used evidently mean "and others." Therefore the notes are payable to Charles R. Whitesell and others or order, without designating whom the others are. To learn what qualities are essential to a negotiable promissory note, says Mr. Parsons in his work on Bills and Notes, page 30, "we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose the first requisite — that thing which includes all the rest — is certainty." Certainty, says the author, as to the person who shall receive the money, the person or persons who are to make the payment, the amount to be paid, and the time when payment is to be made. In Story on Promissory Notes, sec. 35, it is said: "In instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can securely be derived." In *Smith v. Marland*, 59 Iowa, 645,

649, it is said: "The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor, the payee, the amount, the time of payment, and the place of payment." Such is the rule uniformly laid down in all the authorities, and it does not require further citations. This case must not be confounded with notes payable in the alternative, as "to A or B"; it is a promise to pay to Charles R. Whitesell and others jointly. Neither must it be confounded with notes payable to bearer, without naming any payee, nor with the cases in which it has been held that whoever legally owns such a note may recover thereon. These notes being promises to pay Charles R. Whitesell and others jointly, Whitesell could not alone transfer them so as to convey the interest of the other payees any more than if they had been named in the notes. A note made to several persons not partners can only be transferred by the joint action of all of them: *Ryhiner v. Feickert*, 92 Ill. 305; 34 Am. Rep. 130; "and neither payee can, of course, indorse the names of the others without special authority": Randolph on Commercial Paper, sec. 155.

The appellee contends that these notes are in accord with the provision of section 2085 of the code. Turning to section 2082, we see that notes in writing, signed by the person promising "to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery." It will be observed that the promise must be to another person or his order or bearer, and does not dispense with the certainty of which we have been speaking as to whom that other person is. Section 2085 is as follows: "Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or 'bearer' alone will not manifest such intent." Here, again, the promise must be to another, and there is nothing in the section to modify the rule requiring certainty as to whom that other is. It is true, as contended, that negotiable instruments may be transferred by indorsement or delivery; but that does not aid us in determining whether these particular instruments are negotiable. It is said that Charles R. Whitesell is the only payee named. That is true, but the notes show that he is not the only person to whom payment

is to be made. If it be true, as alleged in the answer, that the other persons named, together with Charles R., are in fact payees of the notes, then surely Charles R. is not the only payee, and could not alone transfer them. Authorities are cited in support of the claim that, if any words are used which indicate that the maker intended that the notes should be negotiable, the law will give effect to that intention, as against him. It is a sufficient answer to say that, in view of the law which requires certainty in negotiable instruments as to whom the payee is, the fact that it is left uncertain rather indicates an intention that the instruments should not be negotiable.

The appellee relies upon *Moore v. Anderson*, 8 Ind. 18. That note was payable to steamboat *Juda* and owners, and the court held that the word "owners," as it occurred in the note, sufficiently indicated a person, within the intent of the law. It is a familiar rule that, when a person is designated as payee, and a question arises as to who of several persons bearing the same designation was meant, evidence is admissible to show which is the payee: *Parsons on Mercantile Law*, 88. Under this rule it was admissible to show who was the owner of the steamboat, and hence the designation was sufficient. In *Grant v. Vaughan*, 3 Burr. 1516, it is held that a note payable "to ship *Fortune* or bearer is negotiable, under the rule that, if the name of payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer." See, also, *Parsons on Mercantile Law*, 89. In each of these cases a person was designated as payee — in the one as the owner of the steamboat *Juda*, and in the other as bearer. These notes are payable to Charles R. Whitesell and others or order. The others are not designated by name or otherwise, and, therefore, it is uncertain "as to the persons who shall receive the money," uncertain "to whom its obligations apply, and from whom a title can securely be derived."

We think the district court erred in sustaining the demurrer to the answer.

Reversed.

NEGOTIABLE INSTRUMENTS — CERTAINTY OF PAYEE. — If the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promise will be valid: *Adams v. King*, 16 Ill. 169; 61 Am. Dec. 64. An instrument payable in the alternative to one of two persons is not a promissory note, and cannot be sued on as such, though it otherwise may have all the elements of a good note: *Musselman v. Oakes*, 19 Ill. 81; 68 Am. Dec. 583.

MUSCH v. BURKHART.

[83 IOWA, 301.]

BOUNDARY-LINE TREES—RIGHT TO MAINTAIN.—When trees from thirty to sixty feet high on the boundary line between two tracts of land are used by the owner on the south as a fence by fastening wire thereto, and afford valuable protection from storm and wind to his buildings and stock, while they render a strip of land four or five rods wide, belonging to the owner on the north, unproductive, such adjoining owners are tenants in common as to the trees, and either may be restrained by injunction from cutting down or destroying them.

J. J. Tolerton, for the appellant.

Mullan and Hoff, for the appellee.

ROBINSON, J. The plaintiff owns the south half of the northwest quarter of section 16, in township 90 north, of range 13 west, in Black Hawk County, and occupies it as a place of residence for himself and family. His dwelling-house, barn, and other buildings are on the land described, and near its northwest corner. The defendant owns the northwest quarter of the quarter-section described, and the south boundary line of his land is the north boundary line of the west part of the land of the plaintiff.

About twenty years before the commencement of this action one Jeffers, who then owned the land now owned by the plaintiff, planted along and on the north boundary line thereof, for a distance of about thirty rods, commencing at the northwest corner, a line of cottonwood trees. They have grown to a height of from thirty to sixty feet, and their trunks have a diameter, near the ground, of from one to two feet. The average space between them is about three feet. The plaintiff has attached barbed wires to the north side of the trees, thus making a wire fence. He claims that the fence is needed; that the trees are of great value to him as a wind-break; that they afford valuable protection from storm and winter winds, to his buildings and stock; and that the defendant has threatened to destroy the fence and to cut down and remove the trees, and that unless restrained he will do so. The defendant claims that by agreement with the plaintiff a division of their common boundary line was made for the purpose of fencing, by which the plaintiff was to maintain a fence on the east half of the line, and the defendant on the remainder; that the trees described have thrown out roots, which extend for many feet in his land; that by reason of such roots and the shade of the trees a strip of his land four or five rods wide, north of the trees, has been

rendered unproductive. He denies that the trees are of any value to the plaintiff; claims that he has a right to cut and remove them, for the reason that they are a damage to him, and for the further reason that the plaintiff has cut and taken away some of those originally planted there, and he claims a right to do the same. He admits that he had threatened and fully intended to cut down those now standing.

The evidence shows that the trees are of value to the plaintiff, and that they damage the defendant; also that they stand on the common boundary line. They were planted before the defendant acquired title to the land he now owns. Under what agreement, if any, between the owners of the two tracts of land they were planted, does not appear, although Jeffers and his grantee seemed to have cared for them as their own. They stand upon and draw sustenance from both tracts of land, and in the absence of a showing to the contrary, it must be presumed that they are owned by the parties to this action as tenants in common: *Dubois v. Beaver*, 25 N. Y. 124; 82 Am. Dec. 326; *Griffin v. Bixby*, 12 N. H. 456; 37 Am. Dec. 225. When one tenant in common destroys the subject of the tenancy, he is liable to his co-tenant for the damages he thereby sustains: *Dubois v. Beaver*, 25 N. Y. 124; 82 Am. Dec. 326. A court of equity will, by injunction, restrain one tenant in common at the suit of another, from doing a serious injury to the common estate: 1 High on Injunctions, sec. 344. It is well settled that the commission of a trespass may be restrained by injunction: *Grant v. Crow*, 47 Iowa, 633; 2 Story on Equity Jurisprudence, secs. 923, 929.

It is said that an injunction will not be allowed to restrain the commission of a trespass where the recovery of damages in an action at law would be an adequate remedy for the injuries which would result from the trespass, if committed; and that, to authorize such an injunction, the injury threatened must be irreparable. It was said in *Wilson v. Mineral Point*, 39 Wis. 164, that "an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." It was further held in that case that the destruction of trees and shrubbery growing upon premises occupied as a home by the plaintiff would be, in a legal sense, an irreparable injury to him. In this case, the plaintiff stated that the cutting down of the trees would damage him to the

amount of two hundred dollars; but it does not follow that the damages would not be irreparable within the meaning of the law, nor does it appear that the plaintiff was willing to suffer the damages for the sum named. The trees cannot be replaced, nor can their benefit to the plaintiff, and the comfort and satisfaction he derives from them, be accurately measured by a pecuniary standard. The use which the defendant purposes to make of them is not the one for which they were designed, nor the only one for which they are adapted. There are many cases where rights conflict, or where they are in dispute, in which courts of equity will not interfere by injunction to prevent an impending injury, so long as there is an adequate remedy at law for the injury threatened; but in this case there is no dispute as to the material facts involved, and the respective rights of the parties are known. The plaintiff has an interest in the trees for which he cannot be compelled, at the election of the defendant, to accept a money consideration. A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. This is especially true of property like trees, planted for and adapted to a certain use, and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it without his consent would be to suffer irreparable injury, within the meaning of the law. It appears in this case that the plaintiff has cut down and appropriated a few of the trees which at one time constituted a part of the line of trees in question, but the fact does not authorize the defendant to cut down and remove the remainder. The trees cause him some damage, but not sufficient to authorize him to destroy them. The decree of the district court enjoined the defendant "from tearing down or interfering with the fence on said line, and from in any manner interfering with said trees." This must be construed, in connection with the injury threatened and the relief asked, to enjoin the defendant from destroying or in any manner injuring the trees and fence. It was not designed to prevent him from taking care of the trees and maintaining the fence. His right to do so is as great as that of the plaintiff.

The decree of the district court is affirmed.

BOUNDARY-LINE TREES, when not a nuisance: See *Grandona v. Lovdal*, 73 Cal. 611; 12 Am. St. Rep. 121. That the taking and holding possession of land up to a fence and claiming to be the true owner thereto will render

the possession adverse up to the fence, whether it be the true boundary or not, see *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 000.

BOUNDARY-LINE TREES. — A tree, the trunk of which is divided by a boundary line, belongs to the adjoining proprietors as tenants in common: *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326; but a tree standing exclusively on the land of one of the parties belongs to him exclusively, though the roots and branches extend beyond the boundary line: *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645; *Hoffman v. Armstrong*, 48 N. Y. 201; 8 Am. Rep. 537.

SCHLAWIG v. DE PEYSTER.

[83 IOWA, 823.]

JURISDICTION — NON-RESIDENTS. — Service of process in a foreclosure proceeding cannot be made upon a mortgagor by leaving a copy with a member of his family at his alleged usual place of residence, when he has in fact gone to another state with the intention of taking up his residence there, has there engaged in business, for several years, voted, sat upon juries, and discharged other duties as a citizen, but has not removed his family there, and has at long intervals visited them in the other state, with a continued intention to remove them to the state of his actual residence. A decree of foreclosure based upon such service is void for want of jurisdiction.

APPELLATE PRACTICE — APPELLEES CANNOT ASSIGN ERRORS. — ON AN APPEAL from a judgment the amount thereof will not be reviewed or altered at the request of the appellee.

PRACTICE ON APPEAL — EXTENSION OF TIME IN WHICH TO REDEEM. — A mortgagor whose time to redeem from a mortgage foreclosure as allowed by the court rendering the decree has expired pending an appeal by the mortgagee which prevents redemption, will be allowed an extension of the same time in which to redeem after entry of final judgment upon the appeal.

S. M. Marsh and T. G. Henderson, for the appellants.

O. C. Treadway, and Argo, McDuffie and Argo, for the appellee.

BECK, C. J. 1. The plaintiff executed a mortgage to the defendant De Peyster to secure the payment of six hundred dollars and interest payable upon maturity of certain notes given therefor. Upon the maturity and non-payment of interest, an action to foreclose the mortgage was instituted, and a decree of foreclosure was rendered, and a sale of the land thereon was for the amount of the judgment for interest, with attorney's fees and costs. The plaintiff seeks in this action to redeem from the sale and mortgage, basing his right on the ground, among others, that the decree of foreclosure is void, for the reason that the original notice in the case was not served

upon him as required by law. The service was made by copy delivered to a member of his family (his wife) at his alleged usual place of residence in this state. The plaintiff alleges that his usual place of residence at the time of service was in the Black Hills, Dakota, and not in Iowa, and insists, therefore, that the decree is void for want of jurisdiction of his person.

2. The record very satisfactorily shows that about eighteen months before the service of the notice the defendant, who then lived with his family in Sioux City, went to the Black Hills, intending to make his home there. He left his family consisting of a wife and children, in Sioux City, intending to remove them to the Black Hills as soon as he could do so. He engaged in mining and other business in the Black Hills, and built a house, shop, and other buildings there. He voted at the elections and sat upon juries and discharged other duties of a citizen, but did not remove his family there, though continually intending so to do. He visited his family about two years after he went to the Black Hills, and repeated the visit at long intervals. He never abandoned his purpose of removing his family to Dakota. He seems to have done no act indicating that he regarded Iowa as the place of his residence. We think that actual residence, with the purpose and intent that it is legal and shall be permanent, fixes the legal residence contemplated by the statute providing for service of original notices of actions by a copy delivered to a member of the defendant's family at his usual place of residence, without regard to the place of residence of his family. We know of no rule which fixes absolutely a man's residence at the place of residence of his wife and family. A presumption may arise that his residence is with his family, but that presumption may be overcome by evidence showing the fact to be otherwise. Such presumption is in this way overcome by the evidence in this case. In support of these views, see the following cases: *Cohen v. Daniels*, 25 Iowa, 88; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; 36 Am. Rep. 216; *Ringgold v. Barclay*, 5 Md. 186; 59 Am. Dec. 107; *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530. *Love v. Cherry*, 24 Iowa, 204, cited by counsel for the defendant, is not in conflict with our conclusions in this case. Because of absence of intention to make the residence in question permanent, and a continual purpose to return to a prior place of residence, it was held in that case that at such

prior place of residence service of notice could be lawfully made by copy upon a member of the defendant's family. In this case there was a fixed and constant purpose to remove the plaintiff's family to the Black Hills, which was all the time regarded by him as the permanent place of residence and home of the plaintiff. This purpose was never relinquished or changed, and there is no evidence showing facts in conflict therewith. It is our conclusion that the decree of foreclosure is void for want of jurisdiction of the person of plaintiff, and for this reason he may redeem from the sale and mortgage.

3. Plaintiff complains of the amount which he is required by the decree to pay in order to make the redemption. We think the evidence well supports the correctness of the decree in this regard. Besides, as the plaintiff did not appeal, he is not in a condition to complain of the decree, and ask that it be reversed or changed in this court.

4. By the decree of the court below the plaintiff had ninety days from the rendition thereof in which to make redemption. That time has expired pending the appeal which prevented performance by the plaintiff. The time for redemption ought to be extended for ninety days after the entering of final decree and judgment upon this appeal. The decree of the district court is affirmed, with the modification just suggested, that the plaintiff have ninety days in which to redeem.

A decree to that effect will be entered in this court.

Affirmed.

SERVICE OF PROCESS BY LEAVING IT AT THE PLACE OF DEFENDANT'S RESIDENCE is regarded as an actual service; *Sturgis v. Fay*, 16 Ind. 429; 79 Am. Dec. 440. Change of domicile is consummated when one leaves the state where he has hitherto resided, avowing his intention not to return, and enters another state intending to settle there permanently; *Lowry v. Bradley*, 1 Spear Eq. 1; 39 Am. Dec. 142; *Inhabitants of Phillips v. Inhabitants of Kingfield*, 19 Me. 375; 36 Am. Dec. 760; *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423. The fact of voting in the state to which a person has removed is not necessarily decisive of the character of the residence; *East-erly v. Goodwin*, 35 Conn. 279; 95 Am. Dec. 237.

REYNOLDS v. HAINES.

[83 IOWA, 342.]

EXEMPTIONS — PROCEEDS OF INSURANCE UPON EXEMPT PROPERTY. — When personal property, exempt from execution, is destroyed by fire, the proceeds of insurance upon such property is also exempt.

G. H. Phillips, and Ainsworth and Hobson, for the appellants.

H. W. Clements, for the appellee.

BECK, C. J. 1. The plaintiffs caused process of garnishment to be issued against the Capital Insurance Company upon a judgment against the defendant, claiming that the insurance company is a debtor of the defendant upon a policy issued to him upon which there had been a loss of the property insured. A motion to dismiss the proceeding was sustained upon the grounds, which were not disputed, that the property insured was exempt from execution, being books, instruments, etc., used by the defendant, who was a physician and surgeon, in the practice of his profession.

2. The question presented for decision by the record is this: Are the avails of insurance upon personal property which is exempt under the statute from debts of the assured also exempt? The statute, Code, sec. 3072, declares that "if the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution" certain personal property, which includes the books, instruments, etc., of a physician, the property covered by the policy of insurance in this case. There is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise.

3. The purpose of the statute is to secure to the debtor who is the head of the family — a physician and surgeon in this case — the instruments, books, and other articles which enable him to practice his profession. Its purpose is to secure the necessities of life — food, raiment, and shelter — to families who are dependent upon the heads thereof, by securing to them the instruments and means by the use of which they are enabled to support their families. The exemption is plainly for the benefit of the families of debtors, for those having no family can claim no exemption. The statute must be liberally construed, to carry out its purpose and spirit: *Bevan v. Hayden*, 13 Iowa, 122; *Davis v. Humphrey*, 22 Iowa, 139; *Kaiser v. Seaton*, 62 Iowa, 463. The debtor in the case before

us was authorized, under the statute, to hold the property in question exempt from debts, if it were used for the purpose of his profession. It is plain that the use for which the property was kept determined the question of its exemption. The books, instruments, etc., of the physician and surgeon may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character or improved construction. It is plain that the physician may sell his books and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired *in invitum* by proceedings against the owner.

It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by the creditors. If he could do this, it would be a convenient method to defeat the exemptions of the statute. As we before remarked, the object of the statute is to secure to the family the benefit of certain property. These benefits cannot be enjoyed unless the debtor have the unrestricted use and control of the property free from liability for debts as long as it is owned and used by him. When it is used for other purposes than the support of the family, it becomes liable for debts; but the change of the property into money will not indicate an immediate abandonment of the claim of exemption to the money on the ground of a purpose to invest it in like or other exempt property. Until an opportunity exists to make such investment, which is not a change of articles of exempt property, the debtor ought not to be pre-

sumed to abandon his claim. The debtor, as we have seen, has the authority to change the articles of exempt property by sale and purchase, exchange, or otherwise. He cannot be presumed to have abandoned his right to this authority until he has had an opportunity to exercise it. The creditor cannot complain of its exercise. He is defeated of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to other like property. These doctrines and conclusions find support in the following decisions of this court: *Kaiser v. Seaton*, 62 Iowa, 463; *Mudge v. Lanning*, 68 Iowa, 641. See, also, cases cited in *Kaiser v. Seaton*, 62 Iowa, 463, and the following: *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646; *Leavitt v. Metcalf*, 2 Vt. 342; 19 Am. Dec. 718; *Mulliken v. Winter*, 2 Duvall, 256; 87 Am. Dec. 495; *Tillotson v. Walcott*, 48 N. Y. 188.

Counsel for the plaintiffs cite *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128. It is not in harmony with our conclusions. We think that the reasoning upon which it is based is not sound. Other cases cited by the same counsel are not in conflict with our conclusions. They are to the effect that sales of exempt property, with no purpose to reinvest the avails in other like property, or to exchange the articles of exempted property, or are cases involving the exemption of pension money, and some other cases involving like questions, none of which are in conflict with our conclusions in this case.

We reach the conclusion that the judgment of the district court ought to be affirmed. —

EXEMPTIONS — PROCEEDS OF INSURANCE UPON EXEMPT PROPERTY. — Insurance money due on a house which was a part of the homestead of the insured is not exempt from levy under execution or attachment: *Smith v. Rutledge*, 66 Miss. 683; 14 Am. St. Rep. 606, and note.

DALTON v. WEBB.

[83 IOWA, 478.]

HOMESTEAD — EXEMPTION — INVESTMENT OF PROCEEDS IN ANOTHER STATE.

When the proceeds of the sale of a homestead in one state are invested in a homestead in another, and the latter homestead is sold and the proceeds reinvested in another homestead in the former state, the last homestead is not exempt, but is liable for the debts of the homestead claimant incurred in that state prior to the last investment.

George E. Draper, for the appellants.

H. C. Watkins, for the appellee.

GRANGER, J. Prior to May, 1885, the plaintiff was owing the defendant Webb, which claim has, since May, 1885, been placed in judgment, aggregating some \$576.15. Prior to May, 1885, the plaintiff was the owner of 454 acres of land in and about the town of Tabor, Iowa. In May, 1885, the plaintiff sold the entire tract to C. F. Lawrence for fifteen thousand dollars, which amount was exhausted by the payment of encumbrances on the land and an indebtedness of the plaintiff to Lawrence. A very much disputed question in the case, and one of grave doubt under the evidence, is whether or not it was then agreed, as a part of the consideration for the land, that the plaintiff should continue to occupy his home on the land during his life, he then being a man some sixty-nine or seventy years of age. It is a fact that he continued to reside on the land, or a part of it, for two years after the sale, when a son of C. F. Lawrence, to whom part of the land had been deeded, paid to the plaintiff two thousand five hundred dollars to vacate the premises. Of this two thousand five hundred dollars one thousand dollars were paid on an indebtedness of the plaintiff's to one Wadham, and of the remainder about seven hundred dollars were invested in what the plaintiff now claims as his homestead, one half being paid on the purchase price, and the other half on improvements. The remaining eight hundred dollars were by the plaintiff invested in an attempt to provide him a homestead in Nebraska, under the general homestead law, the money being used in buildings and other improvements on the land. Afterward the homestead claim in Nebraska was sold for \$1,350, and this amount was paid toward the present homestead of the plaintiff. The present homestead was purchased of one Goodell, the purchase price being \$2,150, the plaintiff assuming a mortgage thereon of \$800. The plaintiff's statement in evidence is: "For the

property I now claim as a homestead I paid Mr. Goodell about \$2,150. I took it subject to a mortgage of \$800, paid \$350 of the homestead money on it, and the balance was paid from money coming from Nebraska land."

For the purposes of the case we will assume that the fifteen hundred dollars the plaintiff received from Lawrence in 1887 to vacate the premises are the proceeds of a homestead interest, without saying that such would be our finding upon a consideration of the evidence. The defendant Webb has, by an execution issued on his judgment, levied on the present homestead, and this action is to determine the liability of the homestead therefor. The district court decreed the homestead exempt. In doing so we think it erred. No more than \$350 of the purchase price of a homestead representing a value of about \$2,500 can be said to be the proceeds of the former homestead, unless we hold that the \$1,350 for the Nebraska land were, when invested in this homestead, the proceeds of the former homestead, and to be protected as such. To so hold is to overrule the case of *Rogers v. Raisor*, 60 Iowa, 355. That case, in its purpose, is an exact parallel to this, and the principle there announced is conclusive of the question we are considering. In that case the proceeds of an Iowa homestead were taken to Missouri and invested in a homestead there. Afterward the Missouri homestead was sold, and another homestead purchased in Iowa. It was sought to be subjected to the payment of a debt from which the former Iowa homestead was exempt.

In deciding the case the following language is used: "What, then, was the character impressed on the proceeds of the Iowa homestead when taken to Missouri for reinvestment? The laws of Iowa ceased to operate upon it, and to affect its character as soon as it was invested in real estate in the state of Missouri. It was not the proceeds of the sale of a homestead under the laws of Missouri, for those laws can apply only to a homestead held under the laws of that state. It follows that the fund arising from the sale of the Iowa homestead, upon being carried into Missouri, lost the distinctive character of being the proceeds of a sale of a homestead."

The case holds that the new homestead in Iowa is not exempt. The \$350 of the proceeds of the former homestead invested in the purchase price of this could not change the rule. The homestead laws receive and are entitled to liberal interpretation, but it should only be done within the spirit of

the legislative purpose. At best but \$800 of the \$1,350 from the Nebraska land were ever the proceeds of a homestead, and, under the rule announced, that part lost its character as homestead property, and is no longer entitled to exemption.

Some importance is attached to the fact that the wife of the plaintiff did not go to Nebraska with her husband, nor consent to the use of the money there. It is true that she did not desire to go, and that the plaintiff, because of her health, did not think she should; but the record does not show that she ever had or made any objection to the investment of the money there, nor does it appear that before the investment in Nebraska there was any purpose to invest it in the Iowa homestead.

We think there should be a decree dismissing plaintiff's petition, and the cause is remanded for that purpose.

Reversed.

HOMESTEAD — PROCEEDS OF SALE OF — EXEMPTION FROM EXECUTION. — The proceeds of the sale of a homestead are not exempt from execution unless the vendor at the time of the sale intended investing them in another homestead: *Smith v. Gore*, 23 Kan. 488; 33 Am. Rep. 183. The proceeds of the voluntary sale of a homestead are liable to execution: *Mann v. Kelsey*, 71 Tex. 609; 10 Am. St. Rep. 890. The statutory value of a homestead is exempt from execution where, having been invested in land as a homestead, it is changed into money and kept separate as a homestead fund with no intention to apply it to other uses: *Keyes v. Rines*, 37 Vt. 260; 86 Am. Dec. 707, and note.

GERMAN BANK v. AMERICAN FIRE INSURANCE CO.

[83 IOWA, 491.]

LAWS OF SISTER STATE — PRESUMPTION. — In the absence of a showing to the contrary, the laws of a sister state will be presumed to be the same as those in the state where suit is commenced.

GARNISHMENT OF DEBT DUE NON-RESIDENT FROM FOREIGN CORPORATION. The courts of one state have jurisdiction to garnish a debt due to a non-resident of that state from a foreign corporation having an agent in the state where suit is brought, and upon whom process may be served at the suit of one of its residents.

PROCESS — UNAUTHORIZED SERVICE — EFFECT OF VOLUNTARY APPEARANCE. — When a non-resident appears and interpleads in response to the process of a court having no authority or jurisdiction to issue it, such appearance must be regarded as voluntary and a waiver of the right to object to the jurisdiction of the court.

Myron H. Beach, for the appellant.

McCeney and O'Donnell, for the appellee.

ROBINSON, J. The facts admitted by the pleadings are substantially as follows: The defendant insured the Dubuque Mattress Company on certain property against loss by fire to the amount of \$500. On the first day of April, 1889, and during the life of the policy, the property insured was destroyed by fire, and the defendant thereby became liable on its policy for its full amount. On the next day the assured assigned to the plaintiff its claim against the defendant for the loss, and the latter was notified of the loss and the assignment. At the time in question the plaintiff and the mattress company were Iowa corporations, engaged in business at Dubuque, and the defendant was a corporation organized under the laws of the state of Pennsylvania, having its general agency at Philadelphia, and doing an insurance business in Dubuque, and also in Illinois under a license issued by that state. On the tenth day of April, 1889, the firm of Glover and Willcombe, doing business in Chicago, commenced an action in the superior court of Cook County against the Dubuque Mattress Company. The action was aided by attachment, and the defendant was served with a notice of garnishment as a debtor of the mattress company, and made answer under oath, as required by the laws of Illinois. In its answer it stated the facts in regard to the insurance and loss, and the assignment to the plaintiff. Glover and Willcombe thereupon made application to the court, under the laws of Illinois, for an order requiring the plaintiff to interplead, which was granted and served. The plaintiff then appeared in the action, and, as the answer in this case alleges, "submitted itself, and its rights, claims, interests, and property in and to the subject-matter of this action, to the jurisdiction of said superior court, and made and filed therein its plea and interpleader, setting forth its rights to and ownership of and interests in said subject-matter by virtue of the assignment thereof aforesaid." The plaintiffs in that action denied the allegations contained in the answers of the garnishee and the bank, and the issues thus formed stood for trial in the superior court of Cook County when this action was commenced. That court had competent original jurisdiction, and the proceedings therein had were authorized by the statutes of the state of Illinois.

1. The ground of the demurrer is, in substance, that the facts set out in the answer fail to show that the Illinois court has jurisdiction of the defendant, or of the subject-matter of this action. The theory upon which the demurrer was sus-

tained appears to be that the defendant and the Dubuque Mattress Company were, as to Illinois, foreign corporations; and as the defendant is not shown to have had the money in controversy in its possession in that state, and as the transaction out of which the indebtedness arose was not in any way connected with any office or agency of the defendant, jurisdiction was not acquired by the proceedings therein had. There are authorities which hold that process of garnishment served upon a non-resident of the state in which the action is pending, who is but temporarily within that state, is not effectual as an attachment; and the reason given for such holding is that property not in the state, in the hands of non-residents, and debts due from them, are not within the jurisdiction of the court, and, therefore, cannot be acted upon by it: *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747. "Mere choses in action are considered with reference to the trustee process as local, and not as following the person of the trustee wherever he may transiently be found": *Sawyer v. Thompson*, 24 N. H. 514. In that case it was held that, if all the parties are inhabitants of another state, the garnishee cannot be charged where suit is brought, unless he has goods in his hands belonging to his principal, or has contracted to pay him money or deliver him goods in the state where the action is brought and the process of garnishment is served; and in the absence of statutory enactment to the contrary, that is, perhaps, the general rule, especially when the defendant is not personally served within the state: *Lawrence v. Smith*, 45 N. H. 539; *Green v. Farmers' etc. Bank*, 25 Conn. 452; *Gold v. Housatonic R. R. Co.*, 1 Gray, 425; *Tingley v. Bute-man*, 10 Mass. 343.

But we do not think the authorities cited are applicable to this case. The pleadings do not show what the laws of Illinois are, excepting as we have stated, and, in the absence of a showing to the contrary, we must presume that they are the same as the laws of this state. The defendant, when garnished, was doing an insurance business under a license duly issued. In order to transact such business, it was necessary for it to appoint an agent in that state on whom process might be served with the same effect as though it had been served upon the company: Code, sec. 1144; *Niagara Ins. Co. v. Ro-decker*, 47 Iowa, 165.

The fact that it had been licensed, and was doing an insurance business in the state, authorizes the presumption that it

had in all respects complied with the requirements of its laws: *Ex parte Schollenberger*, 96 U. S. 369. By so doing, it became subject to those laws, and to treatment in many respects as a domestic corporation, and liable to be sued in all respects as such a corporation would be: *McNichol v. United States Mercantile Rep. Agency*, 74 Mo. 472; *Railroad Co. v. Harris*, 12 Wall. 65. An action aided by attachment may be brought in any county of the state, wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of the state: Code, sec. 2580. The record does not show what agency the defendant had in Illinois; but whether it had its principal place of business for the state in Cook County, or whether it was found there in the person of an agent, is immaterial, for the purposes of this case. No question is made as to the agent upon whom service was made, nor as to the county in which the action was brought, and the provisions of law were ample for commencing action against the defendant and enforcing its liability in Illinois: Code, secs. 1144, 2584, 2586. Proceedings by garnishment are, in effect, a suit by the defendant in the name of the plaintiff against the garnishee: *Drake on Attachment*, sec. 452; *Daniels v. Clark*, 38 Iowa, 559. Had the mattress company, before assigning its claim, brought suit against the defendant in Illinois, it cannot be doubted that it could have recovered, and any creditor of the mattress company could have appropriated the debt by means of an action against that company aided by attachment. Therefore, assuming that the defendant owed the mattress company when Glover and Willcombe commenced their action, it was authorized. The case of *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 347, as to the right of garnishment, is much like this in principle, and supports the conclusion we have reached. See, also, *Hannibal etc. R'y Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Morgan v. Neville*, 74 Pa. St. 56; *Barr v. King*, 96 Pa. St. 487; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 216.

It must be understood that what we have said applies to the attachment by garnishment of debts, and not to other personal property, as merchandise, which has a corporeal existence and an actual location. The rule in regard to such property was considered in *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76 Iowa, 172; 14 Am. St. Rep. 213. It is our opinion that the pleadings show that the superior court of Cook County acquired jurisdiction of the claim in controversy

by its process of garnishment, and the service of notice of the proceedings on the bank, the plaintiff in this action.

2. A further objection to the right of the plaintiff to maintain this action is that it submitted itself to the jurisdiction of the superior court of Cook County by appearing therein, and joining issue on the merits of the controversy. If that court was not authorized to make the order requiring the bank to interplead, the action of the latter in appearing must be regarded as voluntary, and as a waiver of its right to object to the jurisdiction of the court: *Young v. Ross*, 31 N. H. 205.

Reversed.

EVIDENCE — PRESUMPTIONS — LAWS OF SISTER STATES. — The courts of one state will presume that the laws of other states are like their own in the absence of proof to the contrary: *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400; *Hill v. Wilker*, 41 Ga. 449; 5 Am. Rep. 540; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298, and note; note to *Lanfeur v. Mestier*, 89 Am. Dec. 673; *Bollinger v. Gallagher*, 144 Pa. St. 205; *James v. James*, 81 Tex. 373; *O'Reilly v. New York etc. R. R. Co.*, 16 R. I. 388; *Mortimer v. Marder*, 93 Cal. 172.

ACTIONS — EFFECT OF APPEARANCE TO WAIVE DEFECTS IN PROCESS AND SERVICE. — A non-resident who voluntarily appears and pleads to the merits of the case thereby waives service of the complaint on him: *Haussman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 75; or objection to the jurisdiction of the court: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135. and note; *Pierce v. Equitable etc. Ass. Co.*, 145 Mass. 56; 1 Am. St. Rep. 433. A voluntary appearance waives all objections to a summons, and to the return thereof: *Union Pac. R'y Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Johnson v. San. Francisco San. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; note to *Alley v. Cuspari*, 6 Am. St. Rep. 180; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; *Cartwright v. Cluvert*, 3 Tex. 261; 49 Am. Dec. 742; *Hanna v. McKenzie*, 5 B. Mon. 314; 43 Am. Dec. 122, and note.

FOREIGN CORPORATIONS — SUITS AGAINST. — A suit may be brought in this state against any foreign corporation holding and exercising franchises in this state by a non-resident plaintiff when the cause of action has arisen in this state: *Fidelity etc. Ass'n v. Ficklin*, 74 Md. 173. A foreign corporation is subject to garnishment in a state where it has property and does business: *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note. See also *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Col. 499; 22 Am. St. Rep. 433.

CITY OF KNOXVILLE *v.* CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY.

[83 IOWA, 636.]

MUNICIPAL CORPORATIONS — POWER OF TO PUNISH FOR NUISANCE. — A municipal corporation has no authority to provide by ordinance for the punishment by fine of persons guilty of a nuisance as defined by the ordinance. The power of the city is limited to providing for the abatement of such nuisances.

INFORMATION against defendants accusing them of the crime of erecting, keeping, and maintaining a nuisance in violation of a city ordinance, in using and keeping a stock-yard in such condition as to constitute a nuisance under such ordinance. Judgment was rendered for the defendants on the ground that the city had no authority to pass the ordinance under which the defendants were prosecuted. Plaintiff appealed.

L. Kinkead, for the appellant.

J. D. Gamble, for the appellees.

GIVEN, J. 1. The discussions resolve themselves into the single inquiry, whether the city of Knoxville had power to pass the ordinances under which this prosecution is had. Eight sections of the ordinance are set out at length, but the parts necessary to be noticed are in substance as follows: It declares what shall constitute a nuisance, and includes such acts as are charged against the defendants, and provides that upon conviction the accused shall be subject to a fine not exceeding twenty-five dollars for the first offense, and in case of a continuance of the nuisance "a fine, the amount of which shall be the aggregate of ten dollars for each day such offender shall continue such nuisance after the first conviction, in no case exceeding one hundred dollars and costs." It is also provided: "And in all cases of conviction under this ordinance, whenever it shall appear to the court that such nuisance exists at the time of conviction, the court shall order and adjudge the removal or abatement or destruction, as the case may require, of such nuisance."

The contention as to the power of the city to pass this ordinance is fully answered in *Incorporated Town of Nevada v. Hutchins*, 59 Iowa, 506. It has been uniformly held that cities and incorporated towns have no authority to pass ordinances except as conferred by statute. Their authority as to

nuisances is expressed in section 456 of the code as follows: "They shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated." The acts with which these defendants are charged are declared to be a nuisance by section 4089 of the code. The power given by section 456 is to abate nuisances. In *Incorporated Town of Nevada v. Hutchins*, 59 Iowa, 506, it was held that the town had no authority to provide, by ordinance, for the punishment by fine of persons guilty of a nuisance. Following that, and the cases therein cited, we hold that the city of Knoxville had no authority to provide, by ordinance, for the imposition of fines against persons committing a nuisance, as defined in the ordinance; that the power of the city is limited to providing for the abatement of such nuisances. The power to provide, by ordinance, for the abating of nuisances is a complete answer to the appellant's argument that great prejudice would result to the citizens if nuisances can only be abated by the slow processes of indictment or action in equity. Cities and incorporated towns have power to provide, by ordinance, for the abatement of nuisances, but not for the punishment by fine of those guilty of maintaining the nuisances. Punishment must be by indictment under the code.

2. It is contended that although part of the ordinance providing for punishing the offender by fine be void, yet so much as provides for abating the nuisance is valid. *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, and *City of Keokuk v. Keokuk N. L. Packet Co.*, 45 Iowa, 197, are cited. This question is not involved in the case before us. The information charged a crime, the prosecution was criminal, and for the recovery of a fine; the abatement of the nuisance was a mere incident. The mayor found that the nuisance had been abated, and hence the appellant did not then or after ask, or was it then entitled to an order of abatement. There was nothing left of the case but to determine whether the defendants were liable to a fine under the ordinance for having maintained the nuisance which, upon notice, they had abated. The question not being involved in the case, we do not determine whether so much of the ordinance as provides for abating nuisances is valid or not, but only that the part thereof providing for fine upon conviction was passed without authority, and is void.

The judgment of the district court is affirmed.

MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCE — PUNISHMENT. — A city has no power to punish disobedience of its ordinances by fine or other penalty unless expressly granted such power: *State v. Bright*, 38 La. Ann. 1; 58 Am. Rep. 155; *St. Paul v. Laidler*, 2 Minn. 190; 72 Am. Dec. 89, and note. Under power to "suppress and restrain" disorderly houses, a city cannot enact an ordinance declaring the keeping of a disorderly house a misdemeanor, punishable by fine and imprisonment: *City of Chariton v. Barber*, 54 Iowa, 360; 37 Am. Rep. 209.

UNION BUILDING ASSOCIATION v. ROCKFORD INS. CO.

[83 IOWA, 647.]

PRACTICE ON APPEAL — FORM OF ASSIGNMENT OF ERROR. — An assignment of error on the part of the trial court in excluding evidence of a material fact need not name the witnesses nor the questions asked them. It is sufficient if it specifies the fact and states wherein the court erred.

INSURANCE IN FAVOR OF THIRD PERSON — EFFECT OF. — When an insurance policy provides that the loss is payable to a third person as a mortgagee instead of the assured, it is merely a designation of the person to whom it is to be paid, and not an assignment of the policy, or a contract to insure the interest of the mortgagee, and he can claim only what the originally insured is entitled to recover under his contract.

INSURANCE IN FAVOR OF THIRD PERSON — NON-PAYMENT OF PREMIUM — ESTOPPEL. — When a fire insurance policy acknowledges the receipt of the payment of a premium which in fact has not been paid, the fact that the policy is made out and sent to the insured on his express promise to remit the premium does not estop the insurer from denying its validity for non-payment of the premium as against a mortgagee of the assured to whom the loss is made payable, although he received the policy from the assured without notice of the non-payment of such premium.

ACTION to recover for loss under a policy of fire insurance issued by the defendant company to one George R. Moore, and in which the loss, if any, was made payable to the plaintiff association, as its interests may appear. The facts are stated in the opinion. Judgment for the plaintiff, and defendant appeals.

Marshall and Taggart, and Sheean and McCarn, for the appellant.

Remley and Ercanbrack, for the appellee.

GRANGER, J. 1. It is urged by the appellee that the assignments of error by appellant are not sufficiently specific to justify us in a consideration of them. With our view of the case, it is only important that we consider the fourth, which is as follows: —

"The court erred . . . in sustaining plaintiff's objections to the testimony and evidence offered by defendant tending

to prove that the premium named in the policy sued on had never been paid by plaintiff, or by any one else, nor any part thereof, and in refusing to permit defendant to prove that no part of said premium had ever been paid; which ruling and proceeding were prejudicial to defendant, and to which ruling and proceeding defendant excepted at the time."

It is said that this assignment "does not state what questions were asked, to which the objections made by plaintiff were sustained, nor to what witnesses the questions were put." In case of an assignment as to the admission or exclusion of evidence, the law does not require that the questions shall be embodied therein. It is not the province of the assignment to contain the part of the record relied upon as showing error, nor is the name of the witness of whom questions are asked material. The error, if any, consists in the exclusion of the evidence offered to establish a material fact in issue. The assignment specifies the fact, and states wherein the court erred, as by refusing evidence proper to sustain such fact. We think the assignment sufficiently specific.

2. We have omitted from the statement of the case issues not essential to the question which we think it important to consider. The application for the policy was by letter, and concluded as follows:—

"If you wish to renew at compact rates, you can send renewal to yours truly, and I will remit, and am

"GEORGE R. MOORE."

In pursuance of the application the policy was sent from Rockford, Illinois, to George R. Moore, at Oxford Junction, Iowa, with a letter requesting him to remit the amount of the premium due, and the policy was by Moore delivered to the plaintiff company. To sustain the allegation of the answer, that the premium had never been paid, the defendant offered the deposition of one Charles E. Sheldon, who was secretary of the company, in which appears the following question: "State whether or not the premium mentioned in said policy has been paid." There was an objection to the question "as being incompetent and immaterial, for the defendant is estopped from denying the receipt of the premium as stated in the policy." The court sustained the objection, and the ruling is made a ground of complaint to us.

As we view the record and the arguments we are brought fairly to consider the question whether the defendant com-

pany, by issuing the policy as it did, with an acknowledgment of a receipt of the premium, and a statement therein that the "loss, if any, is payable" to the plaintiff company, estops the defendant, as against the plaintiff, from proving non-payment of the premium. It will be seen that the policy was not delivered to Moore upon a credit, but that the parties to the contract of insurance intended it as a cash transaction. Moore agreed to remit the premium on receipt of the policy, and the policy was sent to him with a direction to remit. Until the premium was paid there was not a complete transaction between the defendant company and Moore; and it is not questioned but that, as to Moore, the policy would be void if the premium was not paid. It is then a question how the relation of the plaintiff company to the transaction changes the rule as to the defendant company's liability.

The defendant company sent to Moore the policy with the words therein, "Loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear." Mr. Flanders, in his work on Fire Insurance, page 441, says: "Where the policy provides that the loss, if any, is payable to another, to a mortgagee, for example, instead of the assured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence, it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and, of course, none is recoverable by his assignee or appointee. In other words a policy made "payable to A, in case of loss," is an agreement on the part of the insurers that "A" shall recover whatever the person originally insured may be entitled to receive in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer, by virtue of which the assignee acquires the full rights of an assignee of a chose in action." The rule thus stated has the support of many well-considered cases. In *Continental Ins. Co. v. Hulman*, 92 Ill. 154, 34 Am. Rep. 122, where this principle in question was involved, the language above is quoted, and the court says: "Making the loss, if any, payable to Hulman and Cox, mortgagees, was not an insurance of their mortgage interest in the property." The supreme court of Massachusetts has repeatedly held to such a rule. In *Franklin Savings Inst. v. Central*

M. F. Ins. Co., 119 Mass. 240, the plaintiff was a mortgagee; and the policy provided that it was to be payable, in case of loss or damage, to the mortgagees "as their mortgage claim may appear." The policy was declared void because, in violation of its terms, the property afterward became unoccupied. The court says: "It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under his contract." The case cites *Fogg v. Middlesex M. F. Ins. Co.*, 10 Cush. 337; *Hale v. Mechanics' M. F. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; and *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28. *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, involves the essential facts and the principles that should govern in this case. The non-liability of the company was held because of a failure to pay the premium. The policy had been assigned and contained a receipt for the premium. After the assignment the company gave notice to the assured that, if the premium was not paid by a certain day, the policy would be canceled, which was done. The case, in harmony with other cases, marks a distinction between those involving an assignment of the property insured and an assignment of the policy. In case of a mere assignment of the policy the case says: "The assignee cannot claim any benefit from the fact that he is a *bona fide* holder without notice." The notice referred to must have been that of the non-payment of the premium for which the policy contained a receipt. Such are the facts upon which the estoppel is claimed in this case. In *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, the policy had issued to one McCarty with the clause, "Loss, if any, payable to Seth Grosvenor, mortgagee." Afterward McCarty, in violation of the terms of the policy, transferred the property so as to defeat the policy as to him. As to Grosvenor the court says: "The mortgagor must sustain a loss for what the insurers are liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive the payment, that is recoverable from the insurers." In *Carpenter v. Providence W. Ins. Co.*, 16 Pet. 495, speaking of the assignment of a policy, the court says: "The rights of the assignee under the policy cannot be more extensive than the rights of the assignor." Many other authorities are of like import.

The appellee cites some cases as holding a contrary doctrine, but we think, when carefully examined, they do not. We notice two on which we think most reliance is placed. In *Busch v. Humboldt etc. Ins. Co.*, 35 N. J. L. 429, the policy was sent to the agent of the company containing a clause that "the policy is to have no effect until the premium shall have been paid." The agent delivered the policy to the assured with the understanding that the premium, with other premiums, should be paid. The case holds that evidence to show that the premium was not paid was incompetent, and contradicting the receipt in the policy; and the court, by Beasley, C. J., says: "I think when the assured received this policy he had a right to presume either that the agent had settled the premiums with the company, or that they by their receipt intended to relinquish the clause requiring payment." The record in that case does not show that the company, in sending the policy to the agent, required a payment, and from the record that court regarded the facts sufficient to justify the assured in assuming that the payment had been made by the agent of the company or waived. In this case, Moore, in receiving the policy, acted directly with the company, and he knew that its delivery was conditional upon his promise to remit the premium. The policy was retained, if the premium was not paid, in plain violation of the understanding of the parties, and there is no ground whatever for assuming either a payment or a waiver, as held in the New Jersey case. In *Home Ins. Co. v. Gilman*, 112 Ind. 7, the company sought to escape liability because of non-payment of the premium, when the facts were that the assured gave to the agent of the company a credit for which the agent agreed to pay the premiums, and "transmitted the amount of the premium to the company in due course." The case holds that, "for all that appears, the assured was fully justified in presuming that the agent was authorized to make the arrangement disclosed." While the state of the law on this subject is somewhat confused by a statement in some cases of abstract rules, we have found no case in which the party designated in a policy to which the loss, if any, is made payable, whether he be designated an assignee or an appointee to receive the money (both of such terms being employed in the case), is entitled to recover, where, under the facts, the assured could not. The language under which the payment can be claimed and the authorities lead to the conclusion

that the rights of such a party depend on the liability of the company to the assured. Such a liability being established, the payment is to be made to the party designated to receive it. If this premium has not been paid, the case as to Moore is this: The company, relying on his promise to pay the premium on receipt of the policy, sent it to him. No credit was intended, nor had the company reason to suppose he would wrongfully deliver it to others. Properly speaking, it was not a delivery to Moore, because not intended as such without the payment. The case is not different in principle from what it would be if Moore had been present at the office of the company and the policy had been handed to him with the intent that the premium would then be paid, and he wrongfully detained it without payment. We believe no case has or will hold that with such facts the company would be estopped to deny and prove non-payment of the premium. If not estopped as to Moore, it would not be as to the person entitled to receive the loss, if any, in his stead. If not estopped, it must follow that the testimony was admissible to show the fact of non-payment, and that the court erred in excluding it.

Believing that this discussion of the case will be a sufficient guide on another trial, other questions need not be considered.

The judgment is reversed.

INSURANCE — DISTINCTION BETWEEN ASSIGNING POLICY AND MAKING POLICY PAYABLE TO THIRD PERSON: See note to *New York Ins. Co. v. Flack*, 56 Am. Dec. 750.

INSURANCE — PREMIUMS — ACKNOWLEDGING RECEIPT OF — ESTOPPEL. — An acknowledgment of the receipt of the premium in a policy of fire insurance does not estop the insurer, it seems, from showing that the premium has not in fact been paid: *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 213, and note; *Bradley v. Potomac etc. Ins. Co.*, 32 Md. 108; 3 Am. Rep. 121. See note to *Meyer v. Knickerbocker etc. Ins. Co.*, 29 Am. Rep. 205; note to *Lebanon etc. Ins. Co. v. Hoover*, 57 Am. Rep. 514.

SMITH v. HILL.

[83 IOWA, 684.]

PRACTICE ON APPEAL — ASSIGNMENT OF ERROR, WHEN WAIVED. — An objection that no assignment of errors has been made and filed on appeal, not raised until after argument in the appellate court, and then without notice to the opposing counsel, comes too late and must be deemed to have been waived.

PRACTICE ON APPEAL — DISMISSAL OF APPEAL. — The appellate court will not of its own motion dismiss an appeal for failure to file an assignment of errors when the record contains but a single question.

EXEMPTIONS — PENSION MONEY. — A horse obtained by a debtor in exchange for another purchased with pension money, and exempt from levy by statute, is also exempt to its full value when no additional means are invested, though such value is in excess of the amount originally invested in the first horse.

Hyatt and Hyatt, for the appellant.

Martin and Wambach, for the appellees.

ROTHROCK, J. 1. On the same day that the cause was finally submitted to this court, and after it had been fully argued, the appellees filed a paper which contained a suggestion that the appellant had not made and filed an assignment of errors. It is not shown that this paper was served on the appellant or on his counsel. If it be regarded as an objection to the record, it comes too late, and, so far as the appellee is concerned, the omission to assign errors will be regarded as waived: *Andrews v. Burdick*, 62 Iowa, 714. It is true it is held in that case that the court may, on its own motion, enforce the statute requiring the assignment of errors though waived by the parties. In most cases appealed to this court, there are numerous questions involved, and in such cases we would have no hesitancy in dismissing the appeal on our own motion, if errors are not assigned; but as the statute (Code, sec. 3183) merely provides that "the appellee may have the appeal dismissed," unless good cause be shown for a failure to assign errors, we do not feel called upon, on our own motion, to dismiss the appeal in this case. The record contains a single question, and no assignment of error is really necessary to enable the court to determine the very point in issue.

2. The amount in controversy does not exceed one hundred dollars, and the appeal comes to us by a certificate of the trial judge, which is in these words: "It is hereby certified that the following question of law is involved in the decision of the above-entitled cause, upon which it is desirable

to have the opinion of the supreme court, viz.: The defendant, James A. Hill, is a pensioner of the United States, and a resident of the State of Iowa, and has been for more than ten years last past. That in the month of January, 1888, he purchased a horse for \$65, the entire purchase price of which he paid out of moneys received as such pensioner. Thereafter he made an even exchange of said horse for another, which it is agreed is now, and was at the time of the levy of the attachment in this action, worth \$125. Is the defendant entitled to the horse last mentioned, as exempt property, under section 4305, McClain's Code, being section 1, chapter 23, of Laws of the Twentieth General Assembly; or has the creditor a right, in an action at law, to have the property sold, and the excess over the amount originally invested by the pensioner subjected to the payment of his debt?"

The section of the code referred to in the certificate is as follows: "All money received by any person resident of the state as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or attachment or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not."

If the defendant had not traded horses, but had kept the one first purchased for \$65, and paid for with pension money, the horse would have been exempt. No additional money from any source is invested in the horse in controversy. The whole investment in this horse was pension money. It is true it was not a direct investment; but construing exemption laws liberally, as we always do, we think there should be no partition of this horse between the pensioner and his creditors. The result of such a construction of the statute would be to compel the pensioner to retain the identical horses, cows, and other property purchased with his pension money, or to prevent him from investing it in any property. The horse in question is exempt to the extent of the pension money invested in him; and because the pensioner may have made a good trade, and procured a horse worth more than that amount, appears to us to be no reason for ordering the horse to be sold, and the pensioner paid his pension money back, and the balance paid to his credit. It is conceded by the certificate that the money invested in the horse is exempt, but that because he is of more value than the pension money the excess of such

value is not exempt. It seems to us this rule would require pensioners to be careful that they did not invest the exempt money in property worth more than the money paid for it. There is nothing in this opinion inconsistent with the case of *Diamond v. Palmer*, 79 Iowa, 578. In that case it was held by a majority of the court that, where a pensioner paid for the services of a stallion with pension money, it gave him an exempt interest in the colts, the dams of the colts being exempt because purchased with pension money. In the case at bar the horse in question represents pension money, and nothing else. There was not one cent of any other money invested in him.

Reversed.

EXEMPTIONS—PROPERTY PURCHASED WITH PENSION MONEYS—WHETHER EXEMPT. — For a discussion of this subject, see *Crow v. Brown*, 81 Iowa, 344; 25 Am. St. Rep. 501, and note; also extended note to *Rozelle v. Rhodes*, 2 Am. St. Rep. 596.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

MOORE *v.* LOUISIANA NATIONAL BANK.

[44 LOUISIANA ANNUAL, 99.]

NEGOTIABLE INSTRUMENTS. — AN INDORSEMENT FOR COLLECTION does not pass the title or the right to the proceeds of the property, but it makes the indorsee a collecting agent or trustee of the holder.

NEGOTIABLE INSTRUMENTS. — COLLECTING AGENT TO WHOM A BILL OF EXCHANGE IS SENT TO PROCURE ITS ACCEPTANCE, accompanied by a bill of lading, is on the acceptance of such bill authorized to surrender the bill of lading in the absence of instructions to the contrary, and the drawee may refuse to accept unless the bill of lading is surrendered.

W. S. Benedict, for the appellants.

Branch K. Miller and Henry C. Miller, for the appellee.

BREAUX, J. This is an action by plaintiffs, a firm in Philadelphia, against this defendant to recover the value of fifty barrels of whisky sold by them to Oppenheimer & Co. The latter directed the plaintiffs to draw on them, payable in New Orleans, at one day's sight, for the purchase price. The whisky was in a bonded warehouse, for which plaintiffs held certificates.

They drew on the purchasers and attached their warehouse receipts (indorsed by them) to the bill, which was handed to the First National Bank of Philadelphia, which sent it with the receipts to the defendants for collection. The letter was brief, and did not notify the collecting agent to retain the receipts on acceptance of the draft. In compliance with usage the draft was left with the drawees for examination, and it was returned by them with their acceptance, and they retained the warehouse receipts. The acceptors sold these receipts.

The draft was returned by the collecting agent to the Philadelphia bank unpaid.

Plaintiffs allege that the illegal delivery of these warehouse certificates by the defendants enabled the drawees to perpetrate a fraud upon their rights. Testimony was admitted for the purpose of proving the local usage and custom of collecting banks in matter of retaining or delivering, after the acceptance of drafts, bills of lading, or warehouse certificates attached. Two of the witnesses, cashiers, testify that it is the custom of business houses to surrender all evidences of ownership annexed to the draft immediately after its acceptance, unless instruction is given not to deliver them before its payment. Three other witnesses, also cashiers, testify that their respective banks would not deliver the warehouse certificates or bills of lading attached, on the acceptance of the draft, unless so instructed by the party by whom sent.

The sale had been agreed upon. The remaining conditions to perfect it were the acceptance of the draft by the drawees and the transfer of the thing sold into the possession of the buyer. The seller is bound to deliver the thing which he sells whether sold for cash or on credit; in case of non-delivery the seller is liable to damages, if any be thereby occasioned. The term given for payment will not release the vendor from his obligation, unless since the sale the buyer has become a bankrupt or is in a state of insolvency. The insolvency of the drawees, at the time of the acceptance of the drafts, is not an issue of the case. The allegation and the proof do not raise that question.

It is the duty of the collecting agent, immediately after receiving a bill for collection, to take the steps necessary to its prompt acceptance, and if the instrument be not accepted, he must take the necessary steps to fix the liability of the drawee.

If he fails he becomes liable. In order to obtain the acceptance of the drawee, should he decline, unless there are conditions to the contrary, of which he is advised, he must deliver the warehouse receipts attached. If he retains them, he fails to make the delivery of the property the seller is bound to make. He retains the property without any instruction from the seller. Without delivery of this property the drawee's acceptance would be without consideration and his draft would be placed in commerce without his having received anything. The acceptance of the draft makes the drawee the principal debtor. As this draft was made payable

one day after sight, with the three days of grace, it was demandable, as to its payment, in four days. It was not a cash sale; the records do not disclose that the contract implied a sale for cash.

Plaintiff's counsel argues as if it was an unavoidable inference that should have controlled the action of the defendant. The general purpose of the law of negotiable paper and the good of commerce require exactness and certainty. The contract is well defined. It must be executed promptly and accurately. A sale on credit will not give rise to the presumption of an intended cash sale. The restricted indorsement is relied upon by plaintiffs. The indorsement for collection does not pass the title or the right to the proceeds of the paper, but it makes the indorsee or collecting agent the trustee of the holder, and as such he cannot be rendered liable if he complies with an agreement made manifest by the contract.

From Tiedman on Commercial Paper, p. 494, new copy: "But where the bill of exchange is made payable in the future, in the absence of special agreement the bill of lading is to be delivered to the vendee upon his acceptance of the bill of exchange according to its tenor; and the holder cannot insist upon holding it until the bill of exchange is paid. The drawee of the bill of exchange may refuse to accept unless the bill of lading is surrendered." It was held in *National Bank v. Merchants' Bank*, 91 U. S. 92, an analogous case, that in the absence of instruction the plaintiff in error was justifiable in having surrendered the bills of lading annexed to the bill on acceptance. It is difficult to conceive of any other meaning of the bill. We abbreviate from that opinion: If the drawee had given a promissory note for the goods, payable at the expiration of the stipulated credit, it is clear that the vendor could not retain possession of the property after receiving the note for the price. The consideration of the sale is the note. The acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he is denied possession until payment, the transaction ceases to be what it was intended, and is converted into a cash sale.

The purchaser of property on credit has a right to immediate possession, unless there be a special agreement that it shall be retained by the vendor. Such an agreement is not to be presumed. The collecting agent has no right to assume that the vendee's term of credit expires before he has the

goods, and require him to accept the vendor's draft and rely upon his engagements to deliver at a future time. With reference to the authority of the agent, who was intrusted (as was the agent in the case at bar) with a draft "for collection," the court holds that the instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft; that the instruction was to collect the money, and if the drawee is not bound to accept without surrender, it is the duty of the agent to make the surrender. "The drafts were all time drafts." One was drawn at sight, but in Massachusetts, says the court, such drafts are entitled to grace, and in consequence the court classes it as a time draft. In *Lanfear v. Blossman*, 1 La. Ann. 148, 45 Am. Dec. 76, it was decided that the holder of a bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, and he, as holder, retain the bill of lading attached. The decision is favorably commented upon by Justice Strong, the organ of the court in the case to which we have referred.

It is pleaded that plaintiff's claim is sustained by the local custom of merchants, and testimony was heard in support of the plea. The principal upon which such evidence is to be considered is that the parties meant when they sent the draft to let the collecting bank follow the local custom and usage, and that, therefore, instructions were unnecessary. It is not proven that plaintiffs knew of any such local usage and custom, nor is it at all manifest that there is any local custom as contended by plaintiffs. Analysis of the testimony leads to the conclusion that it is not customary to retain warehouse receipts and bills of lading attached to time drafts, after acceptance. The individual instances proven do not have the force of custom. They are not the results of acts repeated "which have acquired the force of a tacit and common consent": C. C. 3. It is not the settled custom. If it were, it would be inconsistent with jurisprudence established by a number of trustworthy decisions which exclude such a custom.

The judgment appealed from is affirmed at plaintiff's cost.

NEGOTIABLE INSTRUMENTS. — AN INDORSEMENT FOR COLLECTION is not a transfer of the title to the indorsee, but merely constitutes him the agent of the indorser: *National Butchers etc. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass.

413; 21 Am. St. Rep. 461; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; 12 Am. St. Rep. 589.

BILL OF EXCHANGE ACCOMPANIED BY BILL OF LADING. — That the drawee of the bill of exchange, under the given circumstances, may refuse to accept it unless the bill of lading is surrendered, seems a necessary complement to the admitted principle that the buyer to whom a bill of exchange for the price is inclosed for acceptance, together with the bill of lading, cannot retain the bill of lading unless he accepts the bill of exchange: See *Marine Bank v. Wright*, 48 N. Y. 1, citing *Bank of Rochester v. Jones*, 4 N. Y. 497.

VONDERBANK v. SCHMIDT.

[44 LOUISIANA ANNUAL, 264.]

SALE OF BUSINESS. — THE GOOD-WILL IS THE FAVOR which the management of the business wins from the public and the probability that all customers will continue their patronage. It is the chance or probability that custom will be had at a certain place of business in consequence of the way that business has been previously carried on.

SALE OF BUSINESS BY RETIRING PARTNER WITHOUT ANY STIPULATION CONCERNING GOOD-WILL conveys simply the advantage which an established business possesses over a new enterprise. It does not include a stipulation that the business shall continue to have the benefit of the name, reputation, or services of the retiring partner. It transfers only so much of the custom as will continue notwithstanding his retirement.

SALE OF BUSINESS WITH THE GOOD-WILL secures to the purchaser the right to continue the old business at the old stand with the probability in his favor that the customers will continue to go there.

TRADE-NAME. — EVERY MAN HAS THE RIGHT TO USE HIS OWN NAME in his own business, though he may interfere with or injure the business of another having the same name, provided he does not resort to any artifice or contrivance for the purpose of producing an impression that the establishments are identical, nor do anything calculated to mislead.

SALE OF BUSINESS AND GOOD-WILL THEREOF DOES NOT INCLUDE THE RIGHT TO USE THE VENDOR'S NAME, and he is therefore entitled to an injunction to prevent such use by the vendee.

TRADE-MARKS AND NAMES. — THE DISTINCTION BETWEEN A TRADE-MARK AND A TRADE-NAME is, that the former owes its existence to the fact that it is actually affixed to a vendable commodity, whereas the latter is a mere property allied to the good-will of the business.

SALE OF BUSINESS — RIGHT TO USE VENDOR'S NAME. — If the proprietor of a hotel commonly known by his name sells the hotel and business and good-will thereof, this does not involve the right to continue the use of his name in connection with such hotel, and if such use is attempted, he is entitled to injunction to prevent its continuance.

Buck, Dinkelspiel and Hart, for the appellant.

Bernard McCloskey, for the appellee.

WATKINS, J. For many years the plaintiff in this suit was engaged in the conduct and management of a hotel, which

was kept in a rented building on Magazine Street, in the city of New Orleans. It was kept on what is popularly known as the European plan, i. e., rooms and lodging without board. While thus conducted, this hotel was customarily styled and denominated the "Hotel Vonderbank," or "Vonderbank Hotel." While thus conducting said hotel, the plaintiff was also engaged in a business on Common Street, in said city, between Camp and St. Charles Streets, under the name and style of "Café Restaurant Vonderbank," which consisted of a bar-room, or saloon, and restaurant and a few rooms for lodgers.

Plaintiff represents that the theory upon which he conducted the two businesses was that his hotel on Magazine Street was to be a boarding-place for the patrons of his restaurant—the two being conducted co-operatively; that in April, 1889, he made a sale of the place to Charles Dormetzer, who carried on the business for some time thereafter, though unsuccessfully, and assigned it to his creditors. An arrangement was made whereby it was conveyed to the defendant. Under the administration of Dormetzer and Schmidt, the hotel was operated as it had been by the plaintiff, under the name "Hotel Vonderbank" or "Vonderbank Hotel," and he complains that it was done in plain violation of his rights and much to the detriment and injury of his business as a *restaurateur*. Denying that defendant required or has the right to enjoy that privilege, petitioner enjoined his further use of his name, claiming damages, and from an adverse judgment he prosecutes this appeal.

The ground on which the defendant resists the plaintiff's demands is, that by his purchase from Dormetzer he acquired all the right, title, and interest of said vendor in and to the "Hotel Vonderbank" or "Vonderbank Hotel," situated on Magazine Street, including the good-will of the business and establishment, and particularly such good-will as said vendor acquired from the plaintiff, including the name or style of said hotel, which he, as a purchaser, is of right entitled to use and enjoy.

Plaintiff admits and claims that he sold to Dormetzer "the shelving, counters, tables, crockery, beds and bedding, and all other movable effects in the building known as the 'Vonderbank Hotel' (or 'Hotel Vonderbank'), situated on Magazine Street . . . and used in connection with his business, now the property of said Vonderbank, together with the good-will of said Vonderbank in and to said business."

The business of which the plaintiff is now the proprietor, as he was at the time of his sale of the hotel, is styled and advertised as "Mathieu Vonderbank, proprietor of Vonderbank's Café and Restaurant," situated at Nos. 126, 128, and 130 Common Street. It is further admitted and conceded that at the date of these transactions the hotel was a going concern in full operation as the "Vonderbank Hotel," or "Hotel Vonderbank," and that it is so now.

It is of an interference with his restaurant business that plaintiff complains, on account of defendant's improper and unlawful use of his name in the style of his hotel. Neither in the sale of plaintiff to Dormetzer, nor in that of the latter to defendant, is there any mention of the name "Hotel Vonderbank" as a factor in the contract, it only appearing from the two acts of sale that there was conveyed all the movable property belonging to the hotel situated in the building known as the Hotel Vonderbank, on Magazine Street, together with the good-will of said Vonderbank, and subsequently of Dormetzer, in and to said premises.

On this state of facts the only question raised is whether, under Dormetzer's purchase from Vonderbank, and his sale to Schmidt, including specifically the good-will of the hotel establishment, the latter acquired, and is entitled to use, the name "Hotel Vonderbank" or "Vonderbank Hotel" as the style of his hotel. This must be determined by the true meaning of the term good-will as it is employed in commercial transactions. We have been referred to only three cases in our own reports in which the subject has been discussed, but in neither of which was discussed the particular question we have here, i. e., what passes by the term good-will in an act of sale.

The cases referred to are the following, viz.: *Wintz v. Vogt*, 3 La. Ann. 16; *Succession of Journe*, 21 La. Ann. 391; *Bergamini v. Bastian*, 35 La. Ann. 60; 48 Am. Rep. 216.

In treating of the good-will of a market stall the court said in the second case that it is "understood (to be) the run of custom which the transferrer had attained by the patronage of his friends resorting to his stand to purchase, and generally from the reputation his stand had acquired as one at which good and wholesome meats are sold, and where customers were accommodated and fairly dealt with." This definition appears to have been paraphrased from that of Judge Story, which is frequently quoted by judges and authors: Story on

Partnership, sec. 99; 8 Am. & Eng. Ency. of Law, 1366, in which brief quotations from English adjudications are found. The third of the three cases above referred to treated of an act of sale of an eating-house at No. 21 Royal Street, city of New Orleans, which contained no stipulation of good-will having been conveyed, the plaintiff's complaint being that his vendor had soon afterward begun a similar business at No. 18 Royal Street, in violation of his contract; but the court substantially held that inasmuch as there was no stipulation in the contract that the vendor should not resume business in his own name, the injunction should be dissolved. We have referred to those decisions for the sole purpose of showing that our own jurisprudence affords no light on the present controversy, and of illustrating the necessity of looking into the decisions of other courts and the opinions of text-writers for the correct solution of it; and we make the following quotations as conveying a clear idea of what good-will is. For instance, the Michigan court says in *Chittenden v. Witbeck*, 50 Mich. 401: "Good-will has been defined by this court to be the favor which the management of a business wins from the public, and the probability that all customers will continue their patronage," or, as stated by Lord Eldon in *Cruttwell v. Lye*, 17 Ves. 335, say the court, "the probability that old customers will resort to the old place." The same court say in *Williams v. Farrand*, 88 Mich. 473: "Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. When it consists in the advantage of location, it follows an assignment of the lease of the location." Or, as was previously said by that court in the *Chittenden* case: "Good-will attaches to the property, and in case of a lease it belongs to the lessee only during its continuation. . . . The claim to an interest in the good-will is inseparable from the claim to an interest in the lease, and when one falls the other falls with it." To a like effect is the opinion of the same court as expressed in *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; 52 Am. Rep. 811.

A standard author, in his treatise on trade-marks, discusses and defines good-will as an analogous right, and quotes with approval the expressions of various English judges on the subject. Thus: "There is considerable difficulty in defining accurately what is included under the term good will. It seems to be that species of connection in trade which induces cus-

tomers to deal with a particular firm": *Wedderburn v. Wedderburn*, 22 Beav. 84. It is the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been previously carried on": *England v. Downs*, 6 Beav. 269. "It may be described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity," etc.: *Story on Partnership*, sec. 90; *Browne's Law of Trade-marks*, secs. 525, 526.

In further illustration of this principle we have selected the following paragraph from *Williams v. Farrand*, 88 Mich. 473, as giving a careful analysis, from a commercial point of view, of what passes by an act of sale containing no stipulation of good-will, viz.: "A retiring partner conveys" — without stipulating good-will — in addition "to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business and produces its accustomed profits on the day after its transfer. It is capital already invested and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time, at least, it is capital awaiting investment, or invested earning nothing. The retiring partner takes these chances, or advantages. He does not agree that the benefit derived from his connection with the business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guarantee the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an interest that he contributed to the success of the business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities and not assurances."

As a corollary of the foregoing opinion an extract may be properly selected from that of the Connecticut court in *Cottrell v. Babcock etc. Mfg. Co.*, 54 Conn. 138, in reference to what passed by a bill of sale of goods, etc., accompanied by a transfer of the good-will merely, viz.: "By purchasing the good-will merely Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that the old customers would continue to go there. If he desired more he should have secured it by positive agreement. The matter of good-will was in his mind. Presumably he obtained all that he desired. At any rate the express contract is the measure of his right; and since that contains a good-will in terms, but says no more, the court will not, upon inference, deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, the vendor might lawfully establish a similar business at the next door," etc.

From the foregoing it appears that good-will is an advantage or benefit which is acquired by a business establishment beyond the mere intrinsic value of the capital stock; that it is the general public patronage and encouragement which a business receives from its customers on account of its local position; that it is the subject of value and price, and of bargain and sale, though intangible; but in order to be conveyed mention of it must be made of it in the act of sale.

The discussion of the rights of a vendee of good-will more frequently arises in the course of liquidation of corporations and sales in partnerships than elsewhere; but, as the principle involved is the same as in cases of bargain and sale between individuals, decisions involving such transactions may be examined, along with others, in ascertaining to what extent and in what class of cases such sales involve the assignment to the vendee of the right to use the name of the vendor.

In *Williams v. Farrand*, 88 Mich. 473, it was held that a retiring partner could not "use his own name . . . in such a way as to lead the public to suppose that he is continuing the old business," etc.

In *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811, three partners retired from the Kalamazoo Wagon Company and thereafter organized and put into operation the defendant company. They were enjoined from prosecuting

that business on the ground that they were guilty of an act of piracy, as they "were not using their own names," but an assumed name, calculated to deceive the public.

Like cases are stated in *Burgess v. Burgess*, 3 De Gex, M. & G. 896, and in *Lee v. Haly*, L. R. 5 Ch. 155.

In the Williams case the court states "that where an express contract has been made . . . for the use by the purchaser of a fictitious name, or a trade-name or a trade-mark, courts will enjoin the continued violation of such an agreement: *Grow v. Seligman*, 47 Mich. 607; 41 Am. Rep. 737; *Beal v. Chase*, 31 Mich. 490; *Burckhardt v. Burckhardt*, 36 Ohio St. 261; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475; but the court further stated that such a stipulation need not be made in the act of sale, because "an assignment of all the stock, property, and effects of a business . . . carries with it the exclusive right to use a fictitious name in which such business is carried on, and such trade-names and trade-marks as have been in use in such business. These incidents attach to the business . . . and pass with it. Courts have frequently held that a trade-mark has no separate existence; that there is no property in words as detached from the thing to which they are applied, and that the conveyance of the thing to which it is attached carries with it the name": *Derringer v. Plate*, 29 Cal. 292; 87 Am. Dec. 170; *Gage v. Publishing Co.*, 11 Ont. 402; *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149. In this last case it is stated that a bill of sale conveying "all the right, title, and interest in and to all and singular the partnership property belonging to the firm" was held to convey the company's trade-marks for the manufacture of certain soaps pursuant to the formulas of Hoxie, though not mentioned, but not to convey the good-will preventing Hoxie from manufacturing soaps otherwise than by such formulas": *Bassett v. Percival*, 5 Allen, 345; *Cottrell v. Babcock etc. Mfg. Co.*, 54 Conn. 122. The same proposition is stated more clearly in *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, the court holding that it was legitimate for one to sell "the use of his name as a trade-mark," i. e., "as a description or designation of a manufactured article, so as to deprive himself of the right to use it as such and confer the right upon another." Thus: "One who has carried on a business under a trade-name and sold a particular article in such a manner, by the use of his name as a

trade-mark or a trade-name, as to cause the business or article to become known or established in favor under such name, may sell or assign such trade-name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the use of it in a similar way": *McLean v. Fleming*, 96 U. S. 245; *Shaver v. Shaver*, 54 Iowa, 208; 37 Am. Rep. 194; *Frazier v. Frazier etc. Co.*, 18 Bradw. 450; *Russia Cement Co. v. Le Page*, 147 Mass. 208; 9 Am. St. Rep. 685. Many of these cases are brought forward in the *Williams* case, and after recapitulating these different propositions the court say: "These propositions are sustained by a long line of authorities, but in none of those cases does the question hinge upon a grant of good-will. Complainants insist, however, that a grant of good-will . . . imposes certain restrictions upon the vendors, and *inter alios* is the use that may be made of their own names"; but the court examined that question fully, and placed the proper limitation upon that contention by stating that its sole effect was to prevent the vendor's subsequent employment of his name so as to impair the good-will he had conveyed to the vendee.

The court, in the *Williams* case, then furnishes the following appropriate illustration of the rule, viz.: "A partnership name may become impersonal after the death of the partners, and it is then likened to a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture and becomes the name by which such article is known in the market, and the right to use the name may, in consequence, follow a grant of the right to manufacture the article or a sale of the business of manufacturing such article; and when the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive." This is followed by this conclusive statement, viz.: "The rule that upon the dissolution of a firm neither party has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old name, are both subject to the exception that a person has the right to use his own name unless he has expressly contracted otherwise. . . . The right to continue the use of a firm name, as well as a restriction upon the use, by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement." Hence the defendants, as retiring partners, without any restrictions having been placed upon them in the act of sale of their interest in the copartnership

business, were recognized to "have the right to use their own names or any collocation of their own names."

We cannot better illustrate the principle that is involved in the foregoing decisions than by citing the case of *Meneely v. Meneely*, 62 N. Y. 431, 20 Am. Rep. 489, wherein an injunction restrained the defendant from in any way "using the name and designation of 'Meneely' in the business of bell-founding in the city of Troy. The name of the defendant is Meneely, and he was engaged in the business mentioned. The necessary consequence of the injunction was to compel the defendant, Meneely, either to discontinue the business of bell-founding in Troy, or procure it to be done in the name of some other person. He was absolutely prohibited from the use of his own name, in his own business, in any way"; but the court ruled that "every man has the absolute right to use his own name in his own business, even though he may interfere with or injure the business of another having the same name, providing he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical or do anything calculated to mislead."

Thus the right of one to the free and unrestricted use of his own name in a business enterprise is so strong that his right is not impaired even if it operate an infringement of a trademark, so that no artifice be resorted to for the purpose of deceiving the public, notwithstanding the "owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it": *Derringer v. Plate*, 29 Cal. 293; 87 Am. Dec. 170; *Sohier v. Johnson*, 111 Mass. 238; *Holmes v. Holmes etc. Mfg. Co.*, 37 Conn. 278; 9 Am. Rep. 324.

In Browne's Law of Trade-marks, secs. 439, 440, in the course of his treatment of good-will, he says: "Courts of equity will protect a party in the use of a name of an inn, hotel, or other place of business, when the sign is simulated. . . . If a man creates a reputation for his business, it is as the keeper of some particular house at a known location, and it is piracy to draw off the custom of his friends or customers who have identified him with the name of his house. It is a personal right. By giving a particular name to a building as a sign of the hotel business, a tenant does not thereby make the name a fixture to the building, and the property of the landlord upon the expiration of the lease."

Clearly, such name or appellation of a hotel is not an inci-

dent of good-will, as good-will exclusively appertains to a given and designated locality, and becomes a fixture of the leased premises, and at the expiration of the lease it passes to the landlord. This is conclusively shown by the author's subsequent observation, viz.: "One may consent to the employment of his name, as that of a place of refreshment; but if such consent be purely gratuitous, or unless there is some valid agreement binding upon the party who gives his consent, he may withdraw it at pleasure and enjoin its further use"; but the argument in favor of such a withdrawal of a business is strengthened by the fact that the author only had in contemplation trade-names or fictitious names, such as St. Charles, St. James, and Hotel Royal, which any one is free to use, for such a name might pass with the sale of the hotel business, and be changed at the caprice of the purchaser.

This distinction makes it clear that the employment of one's own name to designate his place of business cannot be considered as an element of good-will; for if so, following the principles just announced, it would necessarily result in its loss to the person possessing it, as at the termination of the business it would pass to the proprietor of the leased premises. Having conveyed it to a successor — and we have ascertained that the disposition of good-will is matter of contract — he could not thereafter come in competition with his vendee without violating his obligation of warranty; therefore, we conclude with Mr. Browne that whilst the employment of one's own name to designate his place of business may be transferred in like manner as good-will, yet if it be done by a purely gratuitous contract, in the absence of any valid and enforceable agreement for a consideration, he may withdraw it at pleasure.

The conclusion is, that such an employment of his own name in business forms no part of the good-will, but on the contrary, it partakes of the characteristics of a trade-mark, and may be classed as a *quasi* trade-mark, of which Mr. Browne says: "It should be borne in mind that a trade-mark carries the idea of a man's personality, like his ordinary autograph, and, therefore, preserves its essential characteristics wherever it may go. This is not so with *quasi* trade-marks, as the name of a hotel or shop of trade," etc.: Browne's Law of Trade-marks, sec. 90. The distinction between trade-names and trade-marks is stated as follows, viz.: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible com-

modity (secs. 52, 382, 384), whereas, a trade-name is mere property, allied to the good-will of the business." In *Woodward v. Lazar*, 21 Cal. 449, 82 Am. Dec. 751, defendants were restrained from using the name "What Cheer House," as the name of a hotel in the city of San Francisco. Woodward, plaintiff, first erected a hotel building on a leased premises, and gave it that name. During his occupancy as tenant, he purchased and built on the adjoining lot another hotel edifice, and occupied it also. Afterward he surrendered the leased premises and occupied the second, and continued to conduct a hotel business on his own premises, under the name and style of "What Cheer House." Subsequently the defendants purchased the premises first described and conducted thereon a hotel under the original name, "What Cheer House." In that case the contention of the plaintiff in injunction was, that the name belonged to him as the proprietor of the hotel last established, and which he both owned and occupied; and which he had theretofore used continuously while proprietor of the hotel he had leased, and up to the date of its surrender, it being a trade-name. On the other hand the contention of the defendant was, that the name was a mere designation of the building in which the business, as first established, was conducted, and that it attached to the building at the termination of the plaintiff's lease, and passed to him by the purchase thereof from the plaintiff's lessor—it constituting a part of the good-will of said property and establishment. Denying the latter proposition, the court said: "A person may have a right, interest, or property in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign to the business done at that place, does not thereby make the name a fixture to the building and transfer it irrevocably to the landlord." Thus a clear distinction was taken by the California court between the reputation a name or appellation gives to a certain business locality, and which adheres to it without any reference to the proprietor of the establishment personally, and the designation of a name for a locality at which a certain business is carried on, and which is not impersonal, and does not attach to the property, but remains subject to the control of the proprietor. The court, in treating of this distinction, said: "Defendant's claim to protection, so

far as his right results from the good-will acquired for the name while it was applied exclusively to the leased premises, may not be maintainable"; yet plaintiff "is entitled to protection in the exclusive use of the name as proprietor of the new house." Had the name of that establishment formed an element of the good-will of the hotel business while it was being conducted on the leased premises by the plaintiff, it would, under all of the authorities, have passed to the landlord at the termination of the plaintiff's lease, and by his conveyance to the defendant; but as it was rather a personal perquisite of the proprietor while lessee, and not an impersonal ingredient of his business, it did not pass to the landlord, but remained subject to the control of the lessee at the termination of the lease.

Our conclusion is that on reason and authority the case is with the plaintiff; that the name given to a building in which a hotel is kept, which contains the name of the proprietor, does not constitute an element of good-will, though it may tend to enhance the business reputation of the place or *situs* of the business establishment, which is an ingredient of good-will; that while under the authorities such a name is a marketable article and a proper subject of sale, yet it must be expressly understood in the act of sale, and if no consideration be paid, same may be subsequently recalled. Such transactions, being esteemed to be in restraint of trade, are disfavored in commercial dealings. In this case there is some proof of injury sustained by the plaintiff on account of the defendant's improper use of his name; yet we are disinclined to rest a judgment upon it, because we are satisfied the defendant acted fairly and honestly, and under a mistaken belief that he had acquired a right to employ the plaintiff's name as he did.

But we are clearly of the opinion that plaintiff's injunction should be maintained and perpetuated. It is, therefore, ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that there be judgment in plaintiff's favor and against the defendant, perpetually enjoining and restraining the latter from using or employing the name "Hotel Vonderbank" or "Vonderbank Hotel," as the name or style of a hotel or restaurant, at the former site of such establishment as that kept and operated by the plaintiff.

It is further ordered and decreed that plaintiff's demands

for damages be rejected *in toto*, and that the defendant be taxed with the cost of both courts.

GOOD-WILL. — For a definition of good-will, see *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748. The good-will of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, or name, or other matter: *Farwell v. Huling*, 132 Ill. 112.

TRADE-NAME. — One may sell the right to use his own name in connection with a particular business: *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485, and extended note; *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147; 2 Am. St. Rep. 73; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685.

CLEMENTS v. LOUISIANA ELECTRIC LIGHT CO.

[44 LOUISIANA ANNUAL, 692.]

NEGLIGENCE — NON-COMPLIANCE WITH AN ORDINANCE. — If a municipal ordinance prescribes a duty to be performed by an electric corporation, the omission of such duty is negligence, and entitles any person injured thereby to recover damages, unless guilty of contributory negligence.

PRESUMPTION THAT EVERY PERSON HAS PERFORMED A DUTY ENJOINED BY LAW OR CONTRACT is always indulged unless the contrary appears.

ELECTRIC CORPORATIONS OWE A DUTY, independent of statutory regulation, to see that their lines are safe for those who by their occupation are brought in close proximity to them. Hence, if by failure to insulate their wires as required by a municipal ordinance, one lawfully upon a roof, engaged in a service which necessarily requires him to run the risk of coming into contact with such wires, is injured, he is entitled to recover damages; and no presumption will be indulged, in the absence of evidence, that he was guilty of contributory negligence or that anything in the appearance of the wires indicated their dangerous condition.

NEGLIGENCE, CONTRIBUTORY — ONE WHO COMES INTO CONTACT WITH AN ELECTRIC WIRE in the necessary and lawful discharge of his duties will not on that account be regarded as guilty of contributory negligence if it was the duty of the corporation owning such wire to keep it insulated and it had neglected this duty, and there was nothing in the appearance of the wire to indicate such neglect to the person injured, although he had been cautioned to be careful of the wires and to keep away from them.

NEGLIGENCE — RISKS, ASSUMPTION OF. — One who goes upon a roof over which electric wires are stretched cannot be regarded as going into the presence of known danger and assuming the hazards thereof, and as forfeiting his right to recover for injuries suffered from the negligence of the corporation maintaining such wires in not keeping them properly insulated.

NEGLIGENCE, CONTRIBUTORY. — **EVEN IN THE PRESENCE OF KNOWN DANGER**, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to such danger, unless it is of that character that he must assume the risk from the very nature of the danger to which he is exposed.

J. R. Beckwith and J. B. Fisher, for the appellees.

Farrar, Jonas, and Kruttschnitt, for the appellant.

McENERY, J. Joseph Clements was killed on the fourth day of October, 1890, by an electric current from the wires of the defendant company while engaged in repairing the gallery roof at the corner of Gravier and Camp Streets, in the city of New Orleans. The plaintiffs, the father and mother of the deceased, sue the defendant company for damages for the death of their son. There was judgment for the plaintiffs for \$5000, and the defendant appealed.

Joseph Clements was a tinsmith by occupation. He had been employed to go on the roof of the gallery to repair the same by a contractor. He was accompanied by another young man, Alfred Anderson. In half an hour after they went on the roof Clements was killed by coming in contact with the defendant's wires. Two of defendant's wires run up and down Camp Street over the roof of this gallery. They were two feet four inches above it. They were some seventeen inches distant from each other, and the inside wire was about four feet from the Camp Street edge of the gallery. The wires were fastened to a support or "horse" on the gallery, and the inside wire, to prevent its contact with other wires, was secured to the horse by a piece of telephone wire. Between the horse and the Gravier Street side of the gallery there was, on the inside wire, a joint covered with insulating tape. To all appearances it was in good condition, but had been worn by the exposure to the weather, and had evidently lost some of its insulating properties. The defects, however, were not visible, but were exhibited during a storm, as shown by the testimony of S. W. Bennett. From his testimony it is shown that the insulating tape had been defective for a considerable time. He occupied a room fronting on the roof and forbid his employees from going on it on account of the want of proper and safe insulation over the wires.

Clements and his companion were engaged in cleaning the roof, the first in sweeping and the other in carrying off the dirt. The fatal injury to young Clements was rapid in its results, so quick in execution that no witness, not even the witness who was on the roof with him, was able to state with precision his position when he received the shock from the wire; but we think, from all the attendant circumstances, that he was either stepping over the wire or going under it.

It is probable that he came in contact with both wires, making a short circuit, increasing the energy of the electric force. The unprotected or uninsulated places which were not visible on the splice in the wire came in contact with his body under the right shoulder-blade. The wires were so close to the roof that to pass from where Clements was first seen sweeping to the gutter, he must either have stepped over or crawled under. From the distance of the wire above the roof, to step over would in all probability have brought Clements's body in contact with one or both wires. He was only of medium height, and to step two feet four inches would require not only exertion, but some skill to keep clear of touching the wires.

It is in evidence that about the time the accident occurred there was considerable leakage on defendant's line of wires, and this is urged as evidence of neglect on the part of defendant because it showed defective insulation; but the general defect along the defendant's line cannot be evidence of want of due diligence and care. It must be shown that the accident was occasioned by some defect at the point where the injury was inflicted: *Nivette v. New Orleans etc. R. R. Co.*, 42 La. Ann. 1153.

We are aware of the difficulty which confronts the defendant company in keeping its many wires, passing over a large territory to great distances, in a condition of perfect insulation. Parts of the line will necessarily become uncovered, and all that can be expected is that the company will inspect its lines and repair defects as early as practicable. The particular defect in insulation in this case which is complained of was one of long standing, and by a careful inspection of its lines it would have been brought to its notice.

By city ordinance 806, Council Series, the legal duty of the defendant is specified. Section eight of the ordinance provides "that all splices or joints, wherever the same may occur, shall be thoroughly soldered after such joint or splice is made, and in addition thereto shall be well and thoroughly wrapped with kerite tape or other insulating material, so as to produce perfect insulation at such joint or splice." This ordinance was a contract with each and every inhabitant of the city. The defendant's standard of duty was fixed by it, and it is the same under all circumstances, and its omission is neglect.

The first requirement of the plaintiffs was to show the existence of this duty which they alleged had not been performed,

and having shown this, they must show a failure to perform the duty, and thus establish negligence on the part of the defendant.

It is an affirmative fact, the presumption being, until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract: Cooley on Torts, 659, 661.

In many cases evidence of the injury done makes out a *prima facie* case; for instance, where a bailee returns in an injured condition an article which has been loaned to him, or where a passenger on a railway train is injured without fault on his part.

The city ordinance does not specify at what particular localities splices shall be perfectly insulated. On all parts of the line of the defendant company where they occur the duty is specified. The wire of defendant was spliced, and was not insulated as required by the ordinance. It passed over a roof, to which people in adjoining rooms had access, and where in the course of time mechanics must go to make repairs, or laborers to sweep off or clean the roof.

It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who by their occupation were brought in close proximity to them. In this respect and in this particular case we are of the opinion that the defendant's negligence caused the death of Clements; but notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, he cannot recover.

The question is whether the act of the party injured had a natural tendency to expose him directly to the danger which resulted in the injury complained of.

If the plaintiff could, by the exercise of reasonable care at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury.'

When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence.

He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened: *Deikman v. Morgan's Louisiana etc. Co.*, 40 La. Ann. 787; *Kepperly v. Ramsden*, 83 Ill. 354; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Hale v. Smith*, 78 N. Y. 480; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390.

This proof need not be direct, but may be inferred from the circumstances of the case: *Mayo v. Boston etc. R. R. Co.*, 104 Mass. 137; *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436; 2 Thompson on Negligence, 1178.

The deceased Clements was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible and to all appearances were safe.

The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent and not latent defects. Had he known of the defective insulation and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant.

He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger.

But it is urged that Clements was cautioned to keep away from the wires by his employer, Brady, and his failure to do so was gross carelessness on his part.

The evidence on this point is as follows:—

Q. Did you call Clements's attention to the wires? A. No, sir; I cautioned him to be careful of the wires. Every man who goes over a roof must keep away from the wires.

Q. It is the business of a man who goes over a roof to keep away from them? A. Yes, sir.

Q. Did he understand that business? A. Yes, sir.

Q. Did you caution him that morning to keep away from the wires? A. Yes, sir.

Clements's attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admonition to him was only of a danger which he knew to exist, according to the statement of Brady, before he advised him to be cautious of going near the wires, or to keep away from them.

There was only that instinctive dread of danger which overtakes one when he approaches a railroad track. The track in itself is not dangerous, and is only made so by the passage of a train of cars over it. They announce their approach, and hence a person before he attempts to cross a track must exercise great caution, stop and listen, and look up and down the track. Having done this, if a train approaches silently without the accustomed signal and injures him, he would be entitled to recover damages for the injury: *Curley v. Illinois etc. R. R. Co.*, 40 La. Ann. 817; *Brown v. Texas etc. R'y Co.*, 42 La. Ann. 350; 21 Am. St. Rep. 374. The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily and without proper precautions for his safety.

It cannot be said that when Clements went on the roof to repair it he went into the presence of known danger and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger, which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indication of performed duty to which Clements's attention could be fixed, were guaranties that the defendant company had done its duty. These appearances assured him that in the performance of his work in sweeping the roof it was not dangerous for him to risk going over or under the wire: *Bomar v. Louisiana etc. R. R. Co.*, 42 La. Ann. 983.

Even in the presence of a known danger, to constitute con-

tributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed.

From the appearances of the wire, its wrappings with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger, except from the fault of the defendant company. This fault was the cause of his death, and his act in passing under or over the wires was too remote to give it the character of contributory negligence.

This suit was brought under the provisions of act 71 of 1884, amending article 2315 of the Civil Code. The plaintiff therefore can only claim such damages as the deceased Clements could have done had he survived the injury. These would have been for mental and physical suffering, and actual pecuniary loss.

The deceased was almost instantly killed, and no damage can be awarded for suffering. The next inquiry is, What have the plaintiffs suffered pecuniarily by the death of their son in the loss to them of his contributions to their support? The evidence does not show that the plaintiffs were dependent for their support from his earnings, which were not very large, varying, \$1.50 to \$2.50 per day.

The parents, although their domestic relations were pleasant, lived apart, each with a child. The deceased's father says that when he wanted anything he asked him for it, and he, if he had it, willingly gave it.

From the facts as to the amount contributed by the deceased to the support of his parents, we conclude that the verdict of the jury awarding five thousand dollars damages is excessive. Two thousand dollars, we think, would be a most liberal award.

The judgment appealed from is amended so as to fix the amount of the damages for plaintiffs at two thousand dollars, and in other respects it is affirmed.

NEGLIGENCE. — Non-compliance with a statute or ordinance prescribing the performance of a duty imposed for the benefit or protection of others is negligence *per se*: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698; *S. P., Correll v. B. C. R. & M. R. R. Co.*, 38 Iowa, 120; 18 Am. Rep. 22; *Peyton v. Texas etc. Ry Co.*, 41 La. Ann. 861; 17 Am. St. Rep. 430; *Weber v. Kansas City Cable Ry Co.*, 100 Mo. 194; 18 Am. St. Rep. 541.

PRESUMPTIONS. — Every one is presumed by the law to perform his engagements and duties: *Agan v. Shannon*, 103 Mo. 661; *Lent v. New York etc.*

R. R. Co., 130 N. Y. 504; *Lostutter v. Aurora*, 126 Ind. 436. Thus, where a traveler is injured at a railway crossing, and there is no direct evidence that he was negligent in not stopping, looking, and listening, the presumption of law is that he did his full duty and observed the proper precautions: *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64.

ELECTRIC CORPORATIONS. — It is the duty of a telephone company and an electric railway company to see that their wires are in a reasonably safe condition, and if a wire of the latter company is left unguarded, and a wire of the former falls and comes into contact therewith, thus receiving a current of electricity by which a horse is killed, both companies are answerable for the injury: *Electric R'y Co. v. Shelton*, 89 Tenn. 423; 24 Am. St. Rep. 614.

CONTRIBUTORY NEGLIGENCE is not imputed to one who fails to look out for danger when there is no reason on his part to apprehend it: *Engel v. Smith*, 82 Mich. 1; 21 Am. St. Rep. 549. This principle is often applied to the case of foot-passengers, who are held to have a right to assume that the sidewalks are kept in a safe condition: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55; *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459; *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453; *Pettingill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442.

STATE v. McELROY.

[44 LOUISIANA ANNUAL, 796.]

ELECTIONS — CONSTITUTIONAL LAW. — IT IS WITHIN THE POWER OF THE LEGISLATURE of a state to prescribe the manner in which the right of suffrage shall be exercised.

ELECTIONS — STATUTE REQUIRING PRINTING OF NAMES. — A statute requiring the names of all persons to be voted for to be printed on one ticket or ballot is constitutional.

ELECTIONS. — THE WRITING OF THE NAME OF A CANDIDATE ON A BALLOT and the erasing of the name of his opponent must be disregarded if the statute requires the names of all candidates to be printed on each ballot. Such statute is mandatory.

E. W. Sutherland and C. W. Elam, for the appellee.

Wm. Goss, for the appellant.

BREAUX, J. The relator sued out a *mandamus* against the returning officer of the parish of De Soto to compel him to exclude sixty-seven votes cast for his opponent from his return to be made to the secretary of state of the result of the election held on April 19, 1892, also from his count and compilation, and he prays that the said votes be decreed illegal and void.

The facts admitted are: That the relator, Mize, was a candidate for the office of justice of the peace of ward 8 of De Soto parish, at the said election; that his name was printed, as a

candidate for said office, on all the ballots cast in said ward, and he received fifty-nine votes; that his name, as printed, was erased from sixty-seven other ballots cast, and the name of W. R. Crosby was written across the face of these ballots where his (relator's) name was printed; that the relator, at the time, objected to the counting of these written votes for Crosby, and that, notwithstanding his written protest filed with the commissioners, these written votes were counted for Crosby, and count thereof was kept on the tally sheets, and returns thereof were made to the returning officer. It is also admitted that the office of justice of the peace of said ward, involved in this suit, is worth over two thousand dollars.

The question for our determination is: Should a ballot cast be counted in ascertaining the result of an election, on the face of which the printed name of a candidate was erased, and the name of another candidate substituted in writing?

Under the act of 1877, to regulate and maintain the freedom and purity of elections, and to punish persons for false, fraudulent, or illegal voting, the names of persons voted for were required to be written or printed on one ticket. The statute applying is: Section 23 of the said act was amended by act 101 of 1882, as follows: "That all the names of persons voted for shall be printed on one ticket or ballot of white paper, of uniform size and quality, to be furnished by the secretary of state."

The right of suffrage being a political and not a natural right, it is within the power of the state to prescribe how it shall be exercised. The manner of voting, provided by statute, is one of the reasonable regulations. The limitations imposed for the purpose of guarding against fraud, undue influence, and oppression, and of maintaining the secrecy of the ballot, are within the legislative and police powers. That the ballots shall be printed does not add to the constitutional qualification of the voter, and therefore falls within the general authority of legislative laws.

The legislative intent is clearly expressed. In the first act, that of 1887, the words were, "the ballot shall be written or printed"; in the amending act, "it shall be printed." The legislative will cannot be misunderstood. The intention of the legislature should control absolutely. When that intention is clearly ascertained, those upon whom it devolves to execute the statute have no other duty to perform than to follow the legislative will.

While all the minute details of the statutes relating to elections are not mandatory, they are mandatory in requiring that the ballot shall be printed. The positive requirement of the statute does not admit of its being treated as merely directory. By qualifying a statute as directory its requirement is avoided; the intention of the legislature, however plain, is defeated.

It is desirable that the legislature should declare in what respect they mean any particular provision to be void, in event of non-compliance with its terms, and what consequence they intend shall result from non-compliance. In the absence of this, great difficulties arise. We are not willing, however, in the absence of such a declaration, to hold a law as directory in cases in which the intention of the legislature is clearly and emphatically expressed. We prefer a strict construction to the "extensive and comprehensive." Each has able advocates and many authorities in its support.

The grounds of objection urged on the part of the respondent, such as that the purpose of voting is to ascertain the intention of the voter and the will of the majority, and that a ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which he had no control, if broadly and liberally applied, would defeat the object of the statute relating to the printing of the tickets on a ballot of white paper, furnished by the secretary of state, and would render ineffectual the provisions applying to the throwing out and not counting folded tickets, and even those relative to the required certificate of registration, although the purpose of the law is well defined and clear.

Constitutional and statutory provisions for the conduct of elections are either mandatory or directory, and a violation of mandatory provisions will avoid the election, without regard to the motive, or the person guilty of the violation, and without reference to the result: 6 Am. & Eng. Ency. of Law, 325.

In Rhode Island the law requires that each ballot shall be so printed as to give each voter a clear opportunity to designate by cross-marks, in a sufficient margin at the right of the name of each candidate, his choice of candidates, and that each voter shall prepare his ballot by marking in the appropriate margin or place, a cross opposite the name of the candidate of his choice, and that no voter shall place any mark upon his ballot by which it may be afterward identified. The court decided that no mark other than the cross can be used;

that it must be placed in the margin opposite the name of the candidate: *American Digest of 1891*, 1419:

In many of the states there are statutes prescribing the form of the ballots, the kind of paper, and prohibiting any marks, figures, or devices by which one can be distinguished from another. These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory: 6 *Am. & Eng. Ency. of Law*, 349. Directions given by a sovereign in regard to a matter over which his power is conceded, would, according to the ordinary use of language, be held to involve, as its correlative, obedience: *Sedgwick's Statutory and Constitutional Law*, 318, note.

These decisions maintain the principle that mandatory provisions not complied with in an election will result in its avoidance, without reference to motive or person.

In those states in which the ballots must be printed, and the name of the candidate designated by cross-marks, the required marginal notes must be placed as required by statute. That the voter should readily comply with the legislative will is clearly expressed. The voters who cast the sixty-seven ballots did not comply with the statute. In an organized state of society the majority bind the minority by complying with mandatory laws in expressing the popular will.

Judgment affirmed, at appellant's costs.

ELECTIONS — POWER OF LEGISLATURE WITH REGARD TO. — It is within the power of the legislature to prescribe the manner of holding elections and the mode in which the electors shall express their choice: *Parrin v. Wimberg*, 130 *Ind.* 561; 30 *Am. St. Rep.* 254, and note. See also *State v. Saxon*, 30 *Fla.* 668; 32 *Am. St. Rep.* 46, and note.

STATE v. GRYDER.

[44 LOUISIANA ANNUAL, 962.]

FORGERY. — THE CHIEF ESSENTIAL ELEMENTS OF FORGERY are: 1. A writing in such form as to be apparently of some legal efficacy; 2. An evil intent; and 3. The false making of such writing.

FORGERY. — MISPELLING OF THE NAME FORGED OR WRITING IT IN SUCH A MANNER AND WITH SO LITTLE RESEMBLANCE to the signature forged as not to deceive a careful person does not prevent the crime of the writer from being a forgery if there was an intent to deceive, coupled with a possibility of success.

INDICTMENT FOR FORGERY — MISPELLING THE NAME FORGED. — IMMATERIAL VARIANCES resulting from clerical inaccuracies in transcribing

and misspelling a name forged are not necessarily fatal to the indictment. Therefore, setting out in the indictment the name forged as that of J. A. Gandy is not fatal, though in the original instrument such name has much more the appearance of Jo jandy, if such instrument is very illegible and was represented by the accused to have been written by Mr. Gandy.

J. D. Everett and J. R. Land, district attorneys, for the state, appellee.

J. R. Phipps, for the appellant.

FENNER, J. Defendant was prosecuted for forgery of a writing, which was set forth in the indictment in words following:—

“Marsh th 21 the year of 1890. Jim Begman. Plese let Webster Gryder have 2 dollars. J. A. Gandy at Home.”

On the trial the state offered as the document alleged to have been forged an instrument, the chirography of which is so clumsy and illegible as to involve difficulty in deciphering it. It corresponds, however, to that set forth in the indictment, except as to the signature, which has much more the the appearance of “Jo jandy” than “J. A. Gandy.” It may be said, however, that the small “o” has a flourish which makes it resemble a small “a,” and that the small “j” at the beginning of the surname has no dot over it, and is, therefore, neither a “j” nor a “g.”

Counsel for defendant objected to the reception of this document on two grounds, viz.: 1. That said document is so unintelligible as to be incapable of deceiving a person of average understanding, and, therefore, could not serve as a basis for a prosecution or conviction for the crime of forgery; 2. That the said document differs materially from that set out in the indictment.

The first ground of objection was overruled by the judge *a quo* for the reason that it went only to the effect of the evidence, and should be left to the jury. The instrument, moreover, is not unintelligible; its meaning is very clear. We have held that the following are the chief essential elements of forgery: 1. A writing in such form as to be apparently of some legal efficacy; 2. An evil intent; 3. A false making of such writing: *State v. Ford*, 38 La. Ann. 797; 2 Bishop's Criminal Procedure, sec. 400.

There is nothing doubtful about this instrument except the signature. The record does not advise us whether it resembles

the ordinary signature of J. A. Gandy. The freaks of illiterate persons in signing their names might cover such a case. The judge informs us that previous evidence had shown that accused, in presenting the order to Bridgman, had stated that it was written by Gandy, which establishes the evil intent. It is not necessary that there should be such resemblance to the signature forged as to deceive a careful person. We have held that it is sufficient if there be a bare possibility of imposing on another: *State v. Ferguson*, 35 La. Ann. 1042; *State v. Ford*, 38 La. Ann. 797; *State v. Dennett*, 19 La. Ann. 395; 1 Wharton on Criminal Law, secs. 695, 743. Even the misspelling of a name forged does not destroy the possibility of deceiving: *State v. Covington*, 94 N. C. 913; 55 Am. Rep. 650; *Gooden v. State*, 55 Ala. 178. In the case last quoted, conviction was sustained where the name attempted to be forged was Thweatt, but the forged instrument had it Threeth. In another case it was held that an instrument purporting to be issued by a corporation might sustain an indictment for forgery though the names signed as officers of the corporation were entirely different from those of the actual officers: *United States v. Turner*, 7 Pet. 132. It is the intent to deceive, coupled with the possibility of success in deceiving, that make up the offense. It does not follow that the person defrauded knows the handwriting or signature of the party purporting to be the author, or would be able to detect the grossest defects of imitation.

The second ground of objection was overruled by the judge *a quo* for the reasons that "the document did not differ so materially from the one set out in the indictment as to exclude it. The previous evidence showed that defendant had presented the document to Bridgman, and had stated that it was written by Mr. Gandy. The case had been twice tried before and defendant could not possibly have been surprised." We are satisfied that the framer of the indictment intended to transcribe this document as best he could from its illegible chirography. He interpreted the characters making up the signature as meaning J. A. Gandy, and, as heretofore intimated, they are susceptible of that reading from the conformation of the letters "o" and "j."

As Mr. Wharton says, on the subject of such variances: "The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading." Imma-

terial variances resulting from clerical inaccuracies in transcribing and misspelling even of the name forged are no longer necessarily fatal: Wharton on Criminal Pleading and Practice, secs. 173, 273; Wharton on Criminal Evidence, sec. 114. Thus where the name McNicoll, signed to a forged instrument, was set out in the indictment as McNicole, it was held no variance: *Regina v. Wilson*, 2 Car. & K. 527.

The object of requiring the forged instrument to be set out in the indictment is twofold: 1. To enable the judge to determine from its face whether it is, by its nature, a proper subject of forgery; 2. To advise the defendant of the precise offense charged and to save him from surprise. The first object is clearly satisfied, and considering that defendant had had a prior trial under this indictment in which the same instrument was offered in evidence, it seems to us he was fully advised as to what he was to meet, and could suffer no surprise from the variance charged.

There is another bill of exceptions to the judge's charge, but under the judge's statement appended to the bill the complaint against the charge is robbed of all force.

Judgment affirmed.

FORGERY — DEFINITION OF.—The false making or materially altering, with the intent to defraud, of any writing which if genuine, might apparently be of legal efficacy or the foundation of legal liability, is forgery: *Commonwealth v. Wilson*, 89 Ky. 157; 25 Am. St. Rep. 523, and note; *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note; *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note; *People v. Bibby*, 91 Cal. 470. See extended note to *Arnold v. Cost*, 22 Am. Dec. 306.

FORGERY — MISPELLING OF NAME FORGED: See *Langdon v. People*, 133 Ill. 382, where the person intended to be damaged was named Hayward but the name in the forged instrument was "Hayord," and in which it was held that the indictment was not bad for the want of an innuendo that the "Hayord" named in the forged instrument was the same person as the Hayward named in the indictment.

BENJAMIN v. CONNECTICUT INDEMNITY ASSOCIATION.

[44 LOUISIANA ANNUAL, 1917.]

INSURANCE — PLEADING GENERAL ISSUE. — In an action upon a policy of life insurance, if the defendant wishes to prove that certain statements and representations made by the assured in his answers to questions in his application for insurance were untrue, the defendant must, in his answer, specially plead that such statements or representations were false, and thus notify the plaintiff of the issue intended to be made. The pleading of the general issue is not sufficient for this purpose, though the policy of insurance made the application upon which the insurance was based a part of the policy and of the contract, and the plaintiff alleged that he had complied with and performed all the obligations, representations, and warranties required and imposed by the contract.

INSURANCE — PLEADING. — IF AN INSURER RELIES UPON A SPECIAL MATTER IN DEFENSE he must set it forth by proper pleas. It cannot be shown nor relied upon under the general issue. All matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable on the ground of fraud or otherwise, must be specially pleaded.

Wise and Herndon, for the appellee.

Bell and Randolph, for the appellant.

FENNER, J. This is an action on a policy of life insurance, one clause of which makes the application on which the insurance was effected a part of the policy and the basis of the contract, which application contains a stipulation making all the statements, answers, and representations therein contained express warranties.

The petition and amended petition contained all usual and necessary allegations establishing the cause of action, including one to the effect that plaintiff "had complied with and performed all the obligations, representations, and warranties required and imposed by the contract."

The defendant answered, pleading the general issue without any special defense.

On the trial before a jury defendant offered evidence to prove that certain statements and representations made by the insured in his answers to questions in his application for insurance were not true, and that the policy was, therefore, void by reason of the breach of the stipulated express warranty. The plaintiff objected to the reception of this evidence on the ground "that such evidence is not admissible or competent under the general issue and that all matters which show the contract to be void or voidable must be pleaded specially."

The judge *a quo* overruled the objection and admitted the evidence with the qualification that "the evidence is admitted so far as it may disprove any allegations necessary to be proved by plaintiff under the allegations in his petition and documents annexed; but it is not admitted to prove fraud, concealment, or misrepresentations not so connected or involved in the pleadings."

Under this ruling the evidence went to the jury, which nevertheless found a verdict in favor of the plaintiff, and from the judgment in accordance therewith the defendant prosecutes this appeal.

The plaintiff and appellee insists in this court upon his bill of exceptions to the ruling of the judge above stated, and we must determine that question.

The learned counsel for defendant insists, with great vigor, that the question is controlled by the application of the general principles of law requiring allegation and proof of the performance of conditions precedent as an essential to recovery of any contract depending on such conditions; and that, under the general issue, he has the right to all evidence tending to disprove any fact, the proof of which by plaintiff is necessary to make out his case.

This statement of general principles must be admitted as correct, and it must be further conceded that the warranties here involved belong to the class of affirmative, as distinguished from promissory, warranties, and do partake of the nature of conditions precedent in the sense that when breach thereof is established it has effect to render the contract void *ab initio*, or rather to prevent it from ever taking effect.

But in the matter of pleading and proof, these general principles, in their application to insurance contracts, have been greatly modified.

As regards the proof even of affirmative warranties, involving the truth of facts existing at the time of the contract, and warranted as conditions precedent to the effect of the contract, the supreme court of the United States has discharged the insured from the burden of proving compliance therewith, and has thrown upon the insurer the burden of proving a breach thereof, if he relies upon such a defense.

That court said: "The number of the questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover, are such that it may be safely said that no sane man would ever take

a policy, if proof of the truth of every answer were an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand it is no hardship that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded. The judge of the circuit court was therefore right in refusing to instruct the jury that the burden of proving the truth of these answers rested with the plaintiff below: *Piedmont etc. Ins. Co. v. Ewing*, 92 U. S. 377.

In that case the particular breach of warranty relied on had been specially pleaded, and, therefore, the court had no occasion to pass on the admissibility of such evidence under the general issue; but it is manifest that all the reasons which induced the court to require that the insurer should "single out the answer whose truth he proposes to contest . . . and show the facts on which his contention is founded," equally apply as requiring him to notify the insured of such defense by special plea. Otherwise the insured would enter on the trial ignorant of what one of his multitudinous answers would be singled out for contest, and necessarily unprepared to meet his adversary. Indeed, the principle that the defendant carries the burden of proving such defenses involves the necessity of specially pleading them, because, under the general issue, his evidence is limited to that which goes to negative those facts which the plaintiff is required to prove in order to recover.

Accordingly the modern rule requiring that such defenses should be specially pleaded is supported by ample authority. Mr. May, in the latest edition of his work on insurance, referring to matters of defense, such as breaches of warranty, misrepresentations, etc., says: "Matters in defense cannot be availed of unless pleaded. In setting forth the grounds of defense it is not enough merely to negative the truth of a declaration or performance of a condition in the application made by the insured. The particulars in which the untruthfulness or breach consists should be set out as far as can be reasonably done, that the plaintiff may have some notice of what he is to meet. So, where misrepresentation or breach of warranty

is alleged, facts from which the court can see that there is misrepresentation or breach of warranty must be stated."

He fortifies this principle by citation of numerous authorities which need not be here enumerated: *May on Life Insurance*, sec. 591.

Mr. Wood sets forth the same doctrine as follows: "The insurer, if it relies on special matter in defense, must set it forth by proper pleas, as such matter cannot be shown or relied upon under the general issue, as when fraud is relied upon, or a breach of any of the conditions of the policy, as a refusal to arbitrate": 2 *Wood on Insurance*, sec. 522; See also *Bacon on Benefit Societies and Life Insurance*, secs. 455, 469.

Mr. Cooke, in his very recent work on life insurance, frankly concedes that these doctrines are contrary to general principles, but concedes that they are well established. He says: "Many of the established principles of the law of life insurance are in direct contrariety to the rule requiring allegation and proof of the performance of conditions precedent"; and again: "The weight of authority is decidedly against the distinction, (between representations and warranties,) and the prevailing rule is, that the burden of proof of breach of a warranty rests on the insurer as well as does the burden of proof of a material representation. It would seem, however, that we have here another instance of a plain departure from a settled doctrine of the common law, that one seeking to enforce a contract must prove the performance of conditions precedent": *Cooke on Life Insurance*, secs. 123, 14, 93.

Finally, this court in a line of decisions has maintained the principle announced by Mr. Arnould in his work on insurance, that, as relates to policies of insurance, "all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable, on the ground of fraud or otherwise, shall be specially pleaded": 2 *Arnould on Insurance*, 1287; *Pino v. Merchants' etc. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529; *Theodore v. New Orleans etc. Ins. Co.*, 28 La. Ann. 917; *Flynn v. Merchants' etc. Ins. Co.*, 17 La. Ann. 135; *Katheman v. General etc. Ins. Co.*, 12 La. Ann. 35; *Kennedy v. New York etc. Ins. Co.*, 10 La. Ann. 809; *Manning's Unreported Cases*, 169.

We conclude that the foregoing authorities fully maintain the rule invoked by plaintiff that the matters of defense here involved required to be specially pleaded, and that the evi-

dence in support thereof was not admissible under the general issue.

It is not denied, however, that there is a conflict of authority on the question, and counsel for defendant are supported in their views by very respectable precedents. Their error, fortunately, has not prejudiced their client; for, upon the evidence as received and brought up, we could not have reversed the judgment.

Judgment affirmed.

INSURANCE — ACTIONS ON POLICIES — PLEA. — A special plea is necessary in actions on policies of insurance of all matters which show the transaction to be void or voidable on the ground of fraud, misrepresentation, or concealment: *Pino v. Merchants' etc. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; 85 Am. Dec. 240, and note.

OBER v. CRESCENT CITY RAILROAD Co.

[44 LOUISIANA ANNUAL, 1059.]

CONTRACT WITH MUNICIPALITY — RIGHT OF PRIVATE PERSON TO MAINTAIN ACTION THEREON. — If, by contract between a municipal corporation and a private person, the latter undertakes to keep the streets in good condition, and through his negligence such streets are permitted to be in a bad condition and so out of repair that a resident is injured without negligence on his part, he is entitled to maintain an action against such contractor to recover compensation for such injuries.

NEGLIGENCE. — ALIGHTING FROM A STREET-CAR while it is moving is not necessarily negligence as a matter of law.

Carroll and Carroll, for the appellant.

John M. Bonner, for the appellee.

FENNER, J. The substantial allegations of the petition are, that it is the duty of the city of New Orleans to keep her streets in good order and condition, and that by contract this duty, as to Annunciation Street, was devolved on the defendant; that a certain plank crossing on Annunciation Street got out of repair, and had a long, narrow crack in it that was caused by the decay of one of the planks; that the defendant grossly neglected to cover up or repair this crack, although it had been notified so to do; that plaintiff entered one of the cars on the Annunciation line about five o'clock on the afternoon of October 2, 1890, and proceeded up town as a passenger, having paid his fare, and not being a trespasser, and alighted from said car at the lower crossing of St. Andrew

Street, said car moving slowly, and at a slackening rate of speed, preparatory to stopping at the upper crossing; that petitioner was guilty of no negligence in so alighting from said car, being physically strong at the time, and being skilled and an adept in so alighting; that it had been his custom and habit to alight from street-cars in motion for a number of years; that it is the well-established custom in New Orleans for able-bodied men to so alight from street-cars in motion, and petitioner had a right to so alight; that he alighted from said car in the safest manner, with his face toward the front of the car, getting off backward, suspecting no danger, and relying upon the said railroad company's having fulfilled its duty to the city and the public in keeping the street and the crossing in safe condition and repair; that in alighting, petitioner, after releasing his hold on said car, placed his right foot, being the foot that first touched the ground, firmly and squarely on the crossing, but that when he planted his other foot upon the crossing, the heel of his shoe was caught and firmly held in the hole in the said crossing; that the momentum which the motion of the car had imparted to his body impelled him forward, and his left foot being caught and firmly held, petitioner was not free, but was checked and thrown violently to the ground, etc.

To this petition the defendant filed the exception of no cause of action, which was sustained in the lower court. The exception rests exclusively on the ground that the petition, on its face, exhibits such contributory negligence on the part of plaintiff as destroys his right of action.

We shall, for the purpose of this decision, eliminate the question as to whether the defendant was bound, as a carrier, to keep the part of the streets occupied by its track in good order and repair, and shall treat defendant exclusively as the contractual subrogee to the duties of the city in that respect, and as sued in that capacity alone.

The case will thus be considered precisely as if, in absence of its particular contract with defendant, the suit were against the city itself for an injury resulting from a defect in the highway, and we shall so treat it. There can be no question that in such a case the petition would set forth a complete case of gross fault and negligence in leaving a "dangerous hole" in a street crossing, and failing to repair the same, "although notified, advised, and warned of the dangerous condition of the crossing."

The facts alleged further show that this negligence was a cause of the injury, without which it would not have happened.

The rule is now settled that a municipal corporation vested with the powers usually conferred is bound to make and keep its streets reasonably safe and convenient, and if it fails to do so is liable for injury occasioned by its neglect to any person using the street lawfully, and in the exercise of ordinary care: Elliott on Roads and Streets, 446. "If, in consideration of the grant of a license to construct and operate its road on a public street, a railroad company agrees with the city to keep a portion of the street in repair, it thereby becomes responsible to any person who suffers special damage in consequence of a breach of this contract, and a right of action inures to such person thereon": 1 Thompson on Negligence, 359, sec. 25.

It follows that the petition sets forth a good cause of action unless the statement therein contained of the plaintiff's own acts in connection with the injury exhibits such a case of contributory negligence as deprives him of any claim for redress.

The only act stated in the petition to which such a consequence could be attached is charged in the following terms: "That he was a passenger upon a street-car of defendants; that when the car reached the corner of Annunciation and St. Andrew Streets plaintiff alighted therefrom, while the same was moving slowly at a slackening rate of speed, preparatory to stopping on the further side of the street; that he was guilty of no negligence, being physically strong and skilled in so alighting; that he alighted from the car in the safest manner, with his face toward the front of the car, suspecting no danger and relying upon defendants having fulfilled its duty in regard to keeping the crossings in good condition and repair; that in alighting, plaintiff, after releasing his hold upon the car, placed his right foot squarely and firmly on the crossing, but that when he placed his other foot upon said crossing, the heel of his shoe went into the hole above mentioned," etc.

The last statement strongly intimates that the hole was in advance of the point at which plaintiff alighted and was probably covered by the car step, so that no exercise of ordinary care in looking where he was stepping would have revealed the danger, thus shutting out the imputation of negligence in performing the act, if the act itself was not necessarily negligent.

The maintenance of the exception of no cause of action involves the assertion of two legal propositions, viz.: 1. That the act of alighting from a street horse-car while moving, under the circumstances stated, is negligence *in se*—i. e., necessarily and as matter of law; 2. That the particular injury was in such “ordinary, natural sequence” to the negligence as excludes redress: Wharton on Negligence, secs. 1, 3, 73; *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664; *Gerhard v. Bates*, 2 El. & B. 490; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 144; 44 Am. Rep. 419.

The diligent counsel for defendant cites numerous cases holding it to be negligence to jump from a moving steam train, and notably our own recent decision in the case of *Walker v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 795, 17 Am. St. Rep. 417.

He also cites a few cases which apparently apply the same principle to horse-cars, though some of these indicate particular circumstances going to constitute the negligence, such as, in one case, that the person attempting to board a moving car “was encumbered with his coat and dinner bucket”: *Reddington v. Philadelphia Traction Co.*, 132 Pa. St. 154; but both reason and authority indicate the just and broad distinction between the rules applicable to steam and horse-cars.

As Mr. Beach says: “What might be gross negligence as respects a steam-railway might be perfectly prudent and proper to be done in dealing with street-cars. We must not, therefore, attempt to apply to street-railways the rules of law applicable to steam-railways. The cases are different and the reason for the rule ceasing, the rule itself must also cease.” And he further says: “It is well settled that it is not contributory negligence *in se* for one to alight from or to board a moving street-car”: Beach on Contributory Negligence, secs. 89 and 90.

The New York court of appeals states the rule as follows: “Ordinarily, it is perfectly safe to get upon a street-car moving slowly, and thousands of persons do it every day with perfect safety. There may be exceptional cases when the car is moving rapidly, or when the person is infirm or clumsy, or is encumbered with children, packages, or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so; and a court might, upon undisputed evidence, hold, as matter of law, that there was negligence in doing so. But in most cases it must be a question for the

jury": *Eppendorf v. Brooklyn etc. R. R. Co.*, 69 N. Y. 195; 25 Am. Rep. 171.

Says the Minnesota court: "It is well settled that it is not negligence, *per se*, for a person to get on or off a street-car drawn by horses, while it is in motion. It depends upon the circumstances surrounding each case. The question is ordinarily one of fact to be submitted to a jury": *Schacherl v. St. Paul City R'y Co.*, 42 Minn. 42. See also, to same effect, *McDonough v. Metropolitan R. R. Co.*, 137 Mass. 210; Boone on Corporations, sec. 266; Hutchinson on Carriers, sec. 645a.

The statements in this petition certainly exclude every exceptional circumstance which imputes any peculiar recklessness to the act. They assert that the car was moving slowly and with slackening speed; that the plaintiff was not "clumsy or infirm," but strong and active; they exhibit no "encumbrances or hindrances" of any kind, and no other "unfavorable conditions."

We are called upon to hold that the simple act of voluntarily alighting from a horse-car while moving, even under the most favorable conditions, is *per se* negligence which disables the party from asking redress for any injury resulting from the negligence of another, however gross, concurring with such an act.

Reason and authority preclude such a doctrine.

Finding, therefore, that the petition sets forth a clear case of fault and negligence on the part of defendant, and that the facts alleged do not necessarily and as matter of law establish contributory negligence on the part of plaintiff, we are of opinion that the case should go to trial on the merits, when many surrounding and accompanying circumstances, not necessary to be alleged on the face of the pleadings, may be shown by either party, and when we have the whole case before us we will be better able to balance the scales of fault, and determine the causal results so as to reach a conclusion satisfactory to justice.

It is therefore adjudged and decreed that the judgment appealed from be annulled and reversed; that the exception be overruled, and that the case be remanded for further proceedings according to law.

MUNICIPAL CORPORATIONS — LIABILITY OF ONE CONTRACTING WITH, TO KEEP STREETS IN REPAIR. — A city may impose upon a railroad occupying its streets the burden of keeping them in good repair to avoid injury to persons using them; but should the company fail to comply with its obligations

and by its negligence inflict injury, both the city and the company are primarily liable, and when the city is mulcted it may recover against the company in the same action, if both are made parties, or in a distinct suit: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187, and note. A railroad company maintaining its tracks upon the streets of a city must keep them in such condition as to avoid injury to the public in the use of the highway: *Schild v. Central Park etc. R. R. Co.*, 133 N. Y. 446; 28 Am. St. Rep. 658, and note. See *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

NEGLIGENCE — GETTING OFF OF STREET-CARS IN MOTION. — One who voluntarily jumps on or off a street-car while in motion does so at his own peril: *Werbowlky v. Fort Wayne etc. R'y Co.*, 86 Mich. 236; 24 Am. St. Rep. 120, and note with the cases collected. It is not negligence, as a matter of law, to attempt to board a horse-car going at the rate of about four miles per hour: *Briggs v. Union Street R'y Co.*, 148 Mass. 72; 12 Am. St. Rep. 518 and note.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

BALTIMORE AND POTOMAC RAILROAD Co. v. STATE.

[75 MARYLAND, 152.]

NEGLIGENCE — DEGREE OF PROOF REQUIRED. — In cases where negligence is alleged, a wild speculation as to how or from what cause the accident occurred cannot be allowed to stand as proof, or be made the basis for a verdict in favor of the party upon whom the burden of proof lies. There must be evidence upon which the jury could reasonably and properly conclude that the injury was produced by some wrongful or negligent act of the defendant.

RAILROADS — RISKS ASSUMED BY EMPLOYEES. — When a railroad brakeman is killed while engaged in the course of his employment, by smoke and gas arising from insufficient ventilation in a tunnel, after he has accepted and continued in the employ of the railroad company with full knowledge of the condition of the tunnel and of the risks of the work therein, there cannot be any recovery for such injury.

MASTER AND SERVANT — ASSUMPTION OF RISKS. — If a man chooses to accept employment and to continue in it with knowledge of its dangers, he assumes the attendant risks and must abide the consequences, so far as any claim to compensation against the employer is concerned.

Charles H. Carter, John J. Donaldson, and Bernard Carter,
for the appellant.

Thomas Mackenzie and J. V. L. Findlay, for the appellee.

ALVEY, C. J. This action was brought in the name of the state for the use of the father of Harvey F. Abbott, who was killed in the railroad tunnel of the defendant corporation under the city of Baltimore on the twenty-fifth day of August, 1890, to recover for alleged negligence of the defendant as the cause of the death of the son. The deceased was in the employ of the defendant company, as brakeman on a freight

train, and was killed while so employed on such train in passing through the tunnel; and the main question, under the statute (Code, art. 67, sec. 1), is, whether the death of the deceased was caused by any such wrongful act, neglect, or default of the defendant as would, if death had not ensued, have entitled the party injured to maintain the action for such injury; and upon the evidence produced, the preliminary question was raised, whether the evidence was legally sufficient to be submitted to the jury for their consideration. The trial in the court below resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

There is no real dispute or conflict in regard to the facts. The young man who came to his death by the accident was about twenty-two years of age, and had been in the employ of the company some two or three months immediately preceding the time of his death. He had been in railroad employment prior to the time of his entering the service of the defendant; and during the whole time of service with the defendant, his duty required him to go through the tunnel on trains two or three times a day. He was therefore fully acquainted with the tunnel, and with its physical conditions. According to the evidence, the tunnel is near about one mile and a half long, divided into three sections by open cuts; and it was in that section that runs from Pennsylvania Avenue to Gilmor Street that the mangled body of the deceased was found shortly after the accident happened. No one saw or could tell how the accident occurred. It is not pretended that there was any defect in the tracks of the road, or in the machinery of the train, or anything unusual or extraordinary in the make-up of the train, upon which the deceased was acting as brakeman; or that there was any negligence or want of ordinary care in conducting the train through the tunnel; but the contention is that the tunnel is not sufficiently ventilated; that it is not sufficiently supplied with vents or flues to relieve it of the immense quantity of smoke and gas generated by and emitted from the engines while passing through the tunnel; and that the condition of the tunnel was the immediate or primary cause of the accident to the deceased.

This tunnel, according to the evidence, has been in use, as part of the roadway of the defendant, for nearly twenty years past; and for the last ten or fifteen years there have passed through the tunnel, on an average, from 100 to 125 trains, passenger and freight, daily; and the ordinary time for pass-

ing through is from six to nine minutes; and while accidents have happened in the tunnel, the evidence does not show that there has ever been an instance of suffocation, or of death produced by anything like asphyxiation, caused by the smoke and gas of the tunnel, though the smoke and gas at times are shown to be very distressing and oppressive to the railroad employees exposed to it. What is or would be a proper ventilation for the tunnel is a question of scientific engineering, and depends upon a great many conditions. It depends upon the length, curvatures, and grades of the tunnel; its height and width; the number of trains passing through daily and the time of intermission between trains; the character of the fuel consumed, and largely upon the state of the atmosphere and the direction and strength of the wind currents through the tunnel. There was no testimony offered of a scientific character to show in what respect and to what extent the ventilation of the tunnel could be improved by any reasonable supply of means in addition to those actually supplied; and whether the provision actually made for the ventilation of the tunnel, and to relieve it of smoke and gas, is so inadequate as to render it unsafe to the life of one in ordinary health in passing through it as brakeman on a freight train, as the deceased was doing at the time of his death, is at best but matter of speculation and conjecture. No rational mind could so conclude with any degree of certainty from the evidence in the record.

The day upon which the accident occurred, according to the uncontradicted proof, the weather was clear and fine, and at the time deceased entered the tunnel the smoke and gas were not so dense as in less favorable weather. The train entered the tunnel at about half-past eleven o'clock, A. M., and the deceased was last seen alive in an erect position in one of the open or box-cars with a lantern in his hand. Shortly thereafter a noise was heard, as of the breaking of glass, and immediately thereafter the car that the witness was on gave two or three jolts; but it was not until the train reached an open space that it was discovered that the deceased had fallen off. Immediate notice was given and search was made, and the mangled body was found, and also the broken lantern, near the place in the tunnel where the jolts in the car were observed; but how, or from what cause, the deceased fell from the train is wholly unknown. Whether he was overcome by the smoke and gas of the tunnel and fell, or whether he made a

misstep, or lost his hand or foothold in attempting to get from one car to another, are questions of mere speculation and conjecture; and on such state of case, clearly, there was no evidence legally sufficient to be submitted to the jury. A wild speculation as to how or from what cause the accident occurred cannot be allowed to stand for proof or be made the basis of a verdict in favor of the party upon whom the burden of proof lies. There must be evidence upon which the jury could reasonably and properly conclude that the death was produced by some negligence or wrongful act of the defendant. The case should have been withdrawn from the jury. It falls immediately within the principle of the cases of *North-ern Cent. R'y Co. v. State*, 54 Md. 113, and *State v. Baltimore etc. R. R. Co.*, 58 Md. 221.

But if it be assumed, according to the contention of the plaintiff, that the tunnel was not sufficiently ventilated, and that it was by reason of the density of the smoke and gas in the tunnel that the accident occurred, still, there is no ground shown for the right to recover. The uncontroverted proof makes it clear beyond question that the deceased was entirely familiar with the condition of the tunnel, and the discomforts and risks of working therein, whatever they were, as he had been in the daily habit, two or three times a day, for two or three months, of going through the tunnel as brakeman on trains. Having accepted and continued in the employment with full knowledge of the condition of the tunnel and of the risks of the work therein, he could not, if death had not ensued, have recovered for any injury sustained by reason of the condition of the tunnel; and if he could not have recovered for such injury, if living, those authorized to sue in consequence of his death, cannot, by the terms of the statute, have any better or greater right to recover. The principle is well settled that if a person chooses to accept employment, or continue in it, with knowledge of the danger attending it, he must abide the consequences, so far as any claim against the employer is concerned. Upon any other principle it would be impossible to carry on any of the many dangerous trades and trade operations that make up the business of the country. The cases that hold and maintain this doctrine are numerous; and among them is the decision of this court in the case of *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, wherein it was held that the plaintiff must be held to have understood the ordinary hazards attending his employ-

ment, and, therefore, to have voluntarily taken upon himself the hazards, when he entered, or when, with that knowledge, he chose to continue in the service of the employer; and consequently he could not recover. In that case, the case of *Woodley v. Metropolitan Dist. R'y Co.*, L. R. 2 Ex. 384, was referred to, and the principle of the decision of the majority of the court of appeal fully adopted. In the case of *Woodley*, the plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark railroad tunnel rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that the defendants in not adopting any precautions for the protection of the plaintiff had been guilty of negligence; but the court of appeal, reversing the decision of the court of exchequer, held that the plaintiff, having continued in his employment with full knowledge, could not hold the defendants liable for any injury arising from danger to which he voluntarily exposed himself. In that case the leading opinion of the court was prepared by and read for Chief Justice Cockburn; and his reasoning is so pertinent, and the principle and the qualifications thereof are so clearly stated by him, that we cannot do better than quote a passage from that opinion. He said: —

“A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer

terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed; but looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."

There were two judges dissenting in that case, but not from the general principle applied by the majority, but upon the question whether the plaintiff was such employee of the defendant as would relieve the latter of responsibility. The dissenting judges concluded, upon the facts of the case, that the plaintiff was not an employee of the defendant, but of an independent contractor, and therefore entitled to the verdict of the jury; but they all conceded that, if the plaintiff was to be treated as an employee of the defendant, he had no right to recover.

It follows from what we have said that there was error in the court below in rejecting the first, second, third, and fourth prayers offered by the defendant, and in refusing to take the case from the jury. We shall therefore reverse the judgment appealed from, without the award of a new trial.

Judgment reversed.

NEGLIGENCE, WHEN PRESUMED OR NOT PRESUMED FROM THE OCCURRENCE OF AN ACCIDENT: See notes to *Hury v. Goldenbeck*, 6 Am. St. Rep. 792-795; *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495. As to the burden of proof regarding negligence, see notes to *State v. Maine Central R. R. Co.*, 49 Am. Rep. 628, 629; *Smith v. St. Paul City Ry Co.*, 50 Am. Rep. 553-560. The general rule is that the burden of proof is upon the plaintiff in actions for negligence. See, in addition to the cases cited in the above notes, *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 534; *Button v. Frink*, 51 Conn. 342; 50 Am. Rep. 24; *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St.

Rep. 320; *Early v. Lake Shore etc. R'y Co.*, 66 Mich. 349; *Ehr v. Lombard*, 53 N. J. L. 233; *Reiss v. New York Steam Co.*, 128 N. Y. 103; if the evidence leaves the cause of an injury unproved, it cannot be attributed to defendant's negligence or fault: *Sauer v. Union Oil Co.*, 43 La. Ann. 699.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY CONTINUING IN AN EMPLOYMENT WITH KNOWLEDGE THEREOF. — That a servant cannot recover under such circumstances, see *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266; *Porter v. Western N. C. R. R. Co.*, 97 N. C. 66; 2 Am. St. Rep. 272, and note; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Odell v. New York etc. R. R. Co.*, 120 N. Y. 323; 17 Am. St. Rep. 659; *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944; and note to *Richmond etc. R'y Co. v. Norment*, 10 Am. St. Rep. 835.

SPITZE v. BALTIMORE AND OHIO RAILROAD CO.

[75 MARYLAND, 162.]

RELEASE AS DEFENSE TO ACTION. — Unless impeached for fraud or duress, or traversed as not genuine, a release under seal is a defense to an action, and the plaintiff will not be heard to allege or allowed to prove that it was without sufficient consideration, or that the amount paid was, in reality, not all that was due.

CARELESSNESS AS BAR TO RELIEF. — A person who executes without coercion or undue persuasion a solemn release under seal cannot subsequently impeach it on the ground of his own carelessness if at the time of its execution he might have advised himself fully as to the nature and legal effect of the act done. He cannot then complain that an imposition has been practiced upon him.

CARELESSNESS AS BAR TO RELIEF. — A person who at the time of voluntarily executing a release under seal knows or by inquiry might know the exact nature of the act done, cannot subsequently invoke his own heedlessness to impeach his release by calling such heedlessness some one else's fraud. He has no right to act as one who understands what he is doing, unless he intends to lead those with whom he is dealing to believe that he understands the act done.

Thomas Mackenzie and J. V. L. Findlay, for the appellant.

George Dobbin Penniman, W. I. Cross, and John K. Cowen, for the appellee.

McSHERRY, J. This suit was brought to recover damages for a personal injury received by the appellant whilst in the service of the appellee. The appellant was a blacksmith, and in the discharge of his duties had occasion to use a steam trip-hammer owned by the railroad company. One of the housings of this hammer was insecurely fastened, and, as a consequence, when the hammer was being operated by a co-employee of the plaintiff, it suddenly fell upon and seriously crushed the right hand of the appellant. To the declaration

the company pleaded — first, not guilty; and secondly, two releases executed by the appellant under seal. The appellant demurred to this latter plea, and upon the city court overruling the demurrer he filed a replication, to which the appellee demurred. This demurrer was sustained, and the appellant then filed another replication to the second plea, and averred that the releases were obtained by the fraud of the railroad company. Issue was joined upon a traverse of this replication, and the case proceeded to trial. Upon the conclusion of the case made by the plaintiff, the defendant asked and the court gave two instructions which withdrew the case from the jury. By the first, the jury were told that under the undisputed evidence the general foreman of the blacksmith-shop was a fellow-servant of the plaintiff, and if the injury complained of was occasioned by the negligence of the foreman in not repairing the hammer, then the plaintiff could did not recover unless the jury should find that the defendant did not use reasonable care in the employment of the foreman, and that there was no legally sufficient evidence adduced to show that the company had not used reasonable care in the employment of the foreman. By the second they were instructed "that the releases signed by the plaintiff are an absolute bar to the right to recover in this suit, unless there be evidence legally sufficient to show that the said plaintiff was induced to sign the said releases by fraud, and that there has been no evidence produced legally sufficient to show such fraud, and the verdict of the jury must therefore be for the defendant."

A proper understanding of the questions involved requires a brief statement of the material facts disclosed by the record.

In 1882 the appellant became a member of the Baltimore and Ohio Employees' Relief Association, a body corporate then in existence. By the provisions of its by-laws and the terms expressed in the applications of persons who desired to avail of its benefits, all members — and membership was limited to employees of the Baltimore and Ohio Railroad Company and other railroad lines operated by it — were required to contribute a percentage of their monthly wages for the formation of a fund out of which those who might be injured or disabled or become sick whilst in the company's service would receive a daily allowance, regulated according to the amount of their respective contributions. It was plainly stipulated that upon the payment of these allowances the em-

ployee receiving them should execute a release discharging the railroad company from all liability for the injury occasioning his disability. The eighth section of the constitution of the association declared that, for the purpose of lessening the contributions of members, the Baltimore and Ohio Railroad Company had consented to bear all the expenses necessary to the proper management of the association, and had contributed one hundred thousand dollars toward its funds, and that the whole of the interest received from that contribution would be used every year for the same purpose. When the appellant was injured he was a member of this association. On the thirtieth day of May, 1887, he received from the relief association the sum of \$58.50, and on the 20th of June following the further sum of \$36, — these amounts being the sums to which he was entitled under the rules of the association. He was injured on March 16, 1887. Upon each of the two occasions he received the money from the relief association, as just mentioned, he executed a release, under seal, pursuant to the terms of his application for membership; and by these releases he declared: "I do hereby release and forever discharge the said company. . . . from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries." Upon his recovery he returned to the service of the company in a different capacity, and for a part of the time at reduced wages. On March 11, 1890, he instituted this suit.

These releases are the ones relied on in the second plea. We can discover no error in the court's ruling on the demurrer to that plea, and no point has been made with reference to that ruling in the brief of the appellant's counsel.

The replication first filed to the second plea avers that the appellant became a member of the relief association upon the faith of the statements made in article eight of the constitution. That the railroad company did not bear all the expenses necessary to the proper management of the affairs of the association, and that it did not contribute the whole of the interest received from the one hundred thousand dollars to lessen the contributions of the members; and that the company had not guaranteed the faithful and true performance of the association's obligations, as it was required to do by the act of assembly incorporating the association, and that "by reason of the defendant's default or misrepresentation in the

premises, the said papers cannot have the effect of releasing the defendant from the claims of the plaintiff sought to be enforced by this action."

The court was clearly right in sustaining the demurrer to this replication. The replication does not aver that the releases were obtained by fraud. If it was designed to impeach them on that ground, it does so, at most, merely inferentially. It seeks to avoid them, not because any fraud was practiced in procuring them, but because of an alleged partial failure of some of the inducements which led the appellant to become a member of the relief association. Assuming, as we must upon this demurrer, that there was this partial failure of some of these inducements, does it follow that releases voluntarily given upon the payment of sums previously agreed to and definitely fixed are void, and are no answer to an action founded on the tort expressly covered by those releases? However complete may have been the failure of the railroad company to observe some of the inducements which influenced the appellant to become a member of the relief association, after the injury befell him he received by way of compensation or assistance precisely what the association had agreed to pay him; and he received no less by reason of any omission on the part of the railroad company to perform its undertakings with the association. If every obligation of the railroad company now alleged to have been broken had been literally kept, the appellant would not and could not have received, when injured, a single dollar more than he did receive. The utmost that can be asserted is, that he might not have been required to contribute to the relief fund quite so much as he did; but even this is not averred in the replication. The replication asserts, in effect, not that the releases were obtained by fraud, but that the plaintiff was induced to enter the relief association on the faith of agreements made by the railroad company with the association, and then not carried out, whereby the releases ought to be avoided; although it fails to aver that by these omissions or breaches of agreement the plaintiff was injured in the slightest degree. This was no answer to the plea. "Unless impeached for fraud or duress or traversed as not genuine, the defense"—a release—"will be complete, and the plaintiff will not be heard to allege or allowed to prove that it was without sufficient consideration, or that the amount paid was, in reality, not all that was due": *Poe on Pleading*, sec. 653.

The case of *McConkey v. Cockey*, 69 Md. 286, relied on by the appellant, is clearly distinguishable from this. That was a proceeding instituted to set aside a release obtained by a guardian from his ward by fraud. Instead of paying to the ward, when he attained his majority, the money which belonged to him, the guardian prevailed upon him to accept shares of worthless stock, and thereupon obtained the release. The ward did not get what was his, but was imposed upon and deceived. Upon proof of the facts the release was declared null. So in *Page v. Bent*, 2 Met. 371, the defendant relied upon a release of the cause of action, and the plaintiff replied that the release was procured by the fraudulent representations of the defendant, and the case was allowed to go to the jury upon the issue of fact as to fraud in obtaining the release, because there was evidence to support that issue, though it did not, in the opinion of the jury, establish it. These cases bear no resemblance to the question raised by the demurrer we are considering; that question is the sufficiency of the replication.

After the court had sustained the demurrer, the plaintiff filed another replication, alleging, in the usual form, that the releases had been obtained by the fraud of the railroad company. Upon the issue made on the traverse of this replication the question of fraud was properly and distinctly raised. It thereupon became incumbent on the appellant to show that these releases had been procured by the fraud of the defendant; but the only evidence adduced was ruled by the court below to be legally insufficient to sustain the replication. This ruling is brought before us by the second exception in the record taken to the granting of the second instruction heretofore alluded to. In support of this replication the plaintiff proved that the releases were not read to him, and that he could not read English; that he believed he was signing a receipt to the Baltimore and Ohio Employees' Relief Association, and nothing more, and that until he was informed by counsel that the said papers contained a release of the Baltimore and Ohio Railroad Company and all other companies operating its lines, he had no idea of the meaning of the said papers in this respect. He also offered evidence tending to prove that one Gosnell, his superior officer, had waited on him after he was injured and before he signed said papers, and had repeatedly promised him that he would give him another position, at the same wages he was getting when he was hurt; that Gosnell

kept this promise for two years, by employing plaintiff as superintendent or overseer of the axle department, when the office was abolished, since which time he had been in the service of the defendant at reduced wages; that he had not asked to have the said papers read to him; that he read the German Journal, but not the American papers; that he never read a book in English; that he can read a little English now, but could not when he was hurt, and that he did not ask the man who brought the releases what they were, and did not ask to have any explanation of them made to him; that he did not say to the person who brought the releases he could not read English, and that he signed the papers, when requested, without knowing what was in them; that he had been in this country for twenty-four years.

Now, in all this there is not the faintest suggestion that the agents of the railroad company or the officers of the relief association knew, or had reason to believe, that the appellant could not read English, or that they made any statement or held out any inducement which influenced him to sign the releases without inquiring as to their contents. There is no pretense that they concealed anything from him which they were bound to communicate, or that they practiced any imposition or deception upon him. There is nothing to indicate bad faith on their part, and nothing to show that they knew or suspected he did not fully understand the import and effect of the papers he signed. He gave no intimation that he was ignorant of what he was doing, and the attending circumstances, as disclosed, imposed no duty upon these agents and officers to enter into explanations with reference to a subject which, from his silence and his conduct, they were justified in assuming he thoroughly understood. It was in his power to inform himself as to the contents of the releases before he signed them.

The testimony proves, not fraud on the part of the defendant, but carelessness on the part of the plaintiff; and it would lead to startling results if a person who executes, without coercion or undue persuasion, a solemn release under seal, can subsequently impeach it on the ground of his own carelessness, though at the very time of its execution he might, had he seen fit, have advised himself fully as to the nature and legal effect of the act he was doing. He cannot, under these circumstances, be heard to complain that an imposition was practiced upon him. He cannot invoke his own heedlessness

to impeach his solemn release, and then call that heedlessness some one else's fraud. If he did not know what he was signing, it was his plain duty to inquire. He had no right to act as one who understood what he was doing, unless he intended to lead those with whom he was dealing to believe that he did understand the act that he did. Such evidence as that which the plaintiff has adduced cannot be treated as sufficient to strike down, as fraudulent, a written instrument under seal. We are, therefore, of opinion that the court below was right in granting the instruction set out in the second exception.

Inasmuch as this conclusion is decisive against the plaintiff's right to recover, it becomes unnecessary to discuss the question raised by the first exception, viz., the correctness of the first instruction hereinbefore set forth.

The judgment will be affirmed, and it is so ordered.

RELEASE UNDER SEAL IS CONCLUSIVE between the parties, unless there is fraud in obtaining it: *Clark v. Clough*, 65 N. H. 43. The instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress, or some other cause: *Kirchner v. New Home S. M. Co.*, 135 N. Y. 182.

CARELESSNESS AS BAR TO RELIEF. — It may be stated as a broad principle of universal application that if the means of knowledge are at hand and equally available to both parties while the subject-matter is open to the inspection of both, and there are no fiduciary or confidential relations nor any warranty of the facts, the injured party must show that he has exercised ordinary care and diligence to avail himself of the means of information existing at the time of the transaction, before he will be heard to say that he was ignorant of what he was doing, or deceived or misled by the representations of the other party: *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; *Ætna Insurance Co. v. Reed*, 33 Ohio St. 283; *Saunders v. Hatterman*, 2 Ired. 32; 37 Am. Dec. 404; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Long v. Warren*, 68 N. Y. 426; *Slaughter v. Gerson*, 13 Wall. 379; *Lytle v. Bird*, 3 Jones, 222; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Rhoda v. Annis*, 75 Me. 17; 46 Am. Rep. 354; *Messer v. Smyth*, 59 N. H. 41; *Leavitt v. Fletcher*, 60 N. H. 182.

The above rule has often been applied both to the sale of personal property and of land. Thus, if a seller of goods deceives the buyer as to their quality, he cannot avail himself of the deceit in defense against an action for the price, or in reduction of damages therein, if the quality was open to his own observation, and with ordinary diligence and prudence he could have ascertained it. It is negligence on the part of the buyer in such case to fail in exercising reasonable diligence to ascertain the quality of the goods purchased, or to protect himself by a warranty: *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138; 41 Am. Rep. 215; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Leavitt v. Fletcher*, 60 N. H. 182; *Schnoubacker v. Riddle*, 99 Ill. 343.

When the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, and the

purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations: *Slaughter v. Gerson*, 13 Wall. 379; *Collins v. Jackson*, 54 Mich. 186. In such case the purchaser is not entitled to any relief unless the vendor, with superior means of knowledge, intentionally gives a false opinion as to material facts, for the purpose of defrauding the purchaser, and the latter has reason to rely, and does rely on it as true: *Collins v. Jackson*, 54 Mich. 186; *Etna Ins. Co. v. Reed*, 33 Ohio St. 283.

In the case last cited, it was also held that when an agent for an insurance company makes representations to one having a claim for loss against the company, the parties standing in antagonistic relations to each other, the insured has no claim which he can enforce by legal proceedings; such representations are only opinions upon which the insured has no right to rely, and if he does so rely and signs a release of his claim, he does so at his own risk, because the truth or falsehood of such representations could be ascertained by ordinary diligence. Ashburn, J., speaking for the court, said: "If the representation be mere matter of opinion, or of a fact equally within the knowledge of both parties, or of one upon which the party has no right to rely, the representations, though acted upon, will not vitiate the transaction. This is always the case where the parties are mutually cognizant of the facts acted on, or stand on an equal footing in relation to them, and there exists no fiduciary relation between them. The law will not lend its aid to help one thus situated and advised, if he voluntarily neglects to protect himself by the exercise of his common sense."

The rule that when the means of knowledge are at hand and are equally available to both parties, and the subject of the purchase or contract is equally open to their inspection, the failure of the purchaser to avail himself of such means and opportunities will prevent him from impeaching the contract on the ground that he was drawn into it by the vendor's misrepresentations, applies as between the vendor and vendee in the sale of land, as well as to all other transactions. Thus, when it appears that the real quality of land sold was at the time obvious to ordinary intelligence; that it was at hand and open to inspection; that both parties had equal knowledge or means of knowledge by inquiry; that nothing was said or done by the vendor to throw the purchaser off his guard, or to divert him from making inquiries and examinations open to him, and which a prudent man ought to have made, his failure to avail himself of these means and opportunities will prevent him from alleging fraud against his vendor, although he relied upon the false representations made by the latter: *Long v. Warren*, 63 N. Y. 426; *Lytle v. Bird*, 3 Jones L. 222; *Stumlers v. Hatterman*, 2 Ired. 32; 37 Am. Dec. 404. "Whether a false representation made by the vendor in a material matter in a sale of land is actionable depends upon whether it relates to a matter concerning which both parties have not equal means of knowledge, and whether it is an expression of opinion or an affirmation of a fact. If it relates to a matter concerning which both the vendor and the purchaser have equal means of knowledge, the maxim *caveat emptor* applies, and the purchaser is without remedy if he neglects to give attention to the means of knowledge accessible to him: *Messer v. Smith*, 59 N. H. 41. To the same effect are *Savage v. Stevens*, 126 Mass. 207; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166.

Party when Bound by his Signature to a Written Instrument. — It is well settled on authority that a person who bears no confidential relation to the

other contracting party, and who is in the full possession of his faculties, whether able to read or whether illiterate, is bound to know and understand the contents of an instrument executed by him, or in his possession as a party to it, and is estopped to say that he did not read the instrument, conferring rights upon him, which he is seeking to enforce, or that the other party falsely represented its terms. If he cannot read he should require the contract about to be signed by him to be read to him. Failing in this, he cannot in principle complain that the contents of the writing are different from what he supposed them to be when he signed, or that they were falsely stated to him: *Hawkins v. Hawkins*, 50 Cal. 558; *McKinney v. Herrick*, 66 Iowa, 414; *Hallenbeck v. De Witt*, 2 Johns. 404; *Fuller v. Madison Mutual Ins. Co.*, 36 Wis. 599; *School Committee of Providence Tp. v. Kesler*, 67 N. C. 443; *Craig v. Hobbs*, 44 Ind. 363; *New Albany etc. R. R. Co. v. Fields*, 10 Ind. 187; *Clem v. New Castle etc. R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653; *Russell v. Branham*, 8 Blackf. 277; *Bacon v. Markley*, 46 Ind. 116; *Seeright v. Fletcher*, 6 Blackf. 380; *Withington v. Warren*, 10 Met. 431; *Jackson v. Croy*, 12 Johns. 427.

This rule is well illustrated by the case of *Hawkins v. Hawkins*, 50 Cal. 558, where it is held that if a person enters into a contract with another, between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and the means of knowledge of the terms of the writing are equally open to both, and he signs it without reading, or having it read by some one to him, he cannot avoid a liability created by the writing, even if its terms differ from the contract as agreed on verbally; and the fact that he is illiterate does not change the rule.

If one who can read fails to read a deed before he executes it, he cannot afterward avoid it on the ground of deceit practiced upon him. *Greenfield's Estate*, 14 Pa. St. 489-497, where Chief Justice Gibson said: "If a party who can read will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or law." So where the grantor or grantee in a deed failed to read it before its execution, because of his illiteracy and ignorance, he cannot avoid it on the ground that he was deceived as to its contents, if he did not demand that it be read to him, or if he elected to waive a demand for such reading prior to its execution: *Hallenbeck v. De Witt*, 2 Johns. 404; *School Committee of Providence Tp. v. Kesler*, 67 N. C. 443.

In *Fuller v. Madison etc. Ins. Co.*, 36 Wis. 599, this rule was applied to an insured who, although he could not read English, made his application, paid his premium, and accepted his policy without knowing its contents. The court said: "There is no pretense that he was overreached or deceived otherwise than in the fact that he could not and did not read the policy. That was his own negligence. His want of knowledge of English is no excuse. Had he desired to understand the policy in detail, he could and presumably would have had it translated to him by some competent person; but, like many who can read English, he neglected to make himself acquainted with the conditions and terms of the policy on which he has slept so long; and he cannot be heard to complain that his ignorance misled him."

When, however, a party's signature to a written instrument, he being illiterate and unable to read or write, is procured by fraudulent representations or practices on the part of the other party; and the paper thus signed is materially different from that which he intended to sign and thought he

was signing, this is such a fraud in the execution of the instrument as will defeat an action at law thereon; and when a husband agrees to convey an estate to his wife for as long as they reside in a certain place, and she fraudulently has the deed drawn so as to convey an absolute title to her and her heirs, reserving only a life-estate to the husband, he is not guilty of such carelessness in not knowing and understanding the terms of the deed before he signed it, as will bar him from relief in equity, if he, being illiterate and deaf, relied upon the fidelity of his wife: *Carbine v. McCoy*, 85 Ga. 185; *Smentek v. Cornhauser*, 17 Ill. App. 266.

In the absence of false representations calculated to deceive a man of ordinary prudence, one who fails to read a bond, contract, or other writing signed by him, is not entitled to any relief: *Gulliker v. Chicago etc. R. R. Co.*, 59 Iowa, 416; *Rogers v. Place*, 29 Ind. 577; *Seeright v. Fletcher*, 6 Blackf. 380; also *May v. Johnson*, 3 Ind. 449, where the court said: "It appears that he signed the bond without reading it himself, or hearing it read, and, with all the means of knowing the truth in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. In such a case the law affords no relief." So the court, in *Sanger v. Dun*, 47 Wis. 615-620, 32 Am. Rep. 789, in speaking of a contract in the shape of a receipt, said as to the party signing it: "It is not claimed that he was overreached or deceived otherwise than in the fact that he did not read or understand the contract which he signed; but that was his own negligence. It will not do for a man to enter into a contract, and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."

When an injured party has capacity to read a release for damages signed by him and an opportunity to do so, and no fraud is practiced upon him to prevent him from reading, and he chooses to rely upon what another says about it without requesting it to be read, he is estopped by his own negligence from claiming that he is not bound by its terms: *Wallace v. Chicago etc. R'y Co.*, 67 Iowa, 547; *Gilliker v. Chicago etc. R. R. Co.*, 59 Iowa, 416; *Pennsylvania R. R. Co. v. Shay*, 82 Pa. St. 198. On the other hand, if any false representations are made or any undue influence is practiced in obtaining such release, it is not binding on the person signing it, although he did not read it or request that it should be read to him: *Shulz v. Chicago etc. R'y Co.*, 44 Wis. 638; *Bussian v. Milwaukee etc. R'y Co.*, 56 Wis. 325; *Chicago etc. R'y Co. v. Lewis*, 109 Ill. 120. Thus, in *Bussian v. Milwaukee etc. R'y Co.*, 56 Wis. 325, after the plaintiff had commenced an action against a railroad company to recover damages for personal injuries, the agent of the company obtained a release from her in the absence of her attorney and when she had no friendly adviser. Her attending physician, acting on behalf of the company, urged her to sign the release when she objected on the ground that she desired to wait until she could consult with her attorney. She was not informed as to what her attorney would be entitled to charge her for services, and the company's agent represented that it would probably defeat her in the action, but that if she won her counsel would probably absorb any damages recovered after an uncertain and protracted litigation. The court held that a release obtained by such means and under such circumstances was a fraud upon the injured party, and for this reason not binding.

In *Chicago etc. R'y Co. v. Lewis*, 109 Ill. 120, the facts were that a passenger was severely injured by a railroad company, and after being taken to a hotel, some hours subsequently was induced by the company's agent to sign

a release of his cause of action, under the belief that he was signing only a receipt for money, which belief was caused by fraudulent practices and representations, and his signature procured while he was suffering great physical pain and laboring under the effects of opiates, and it was held that under such circumstances he was not chargeable with such negligence, in executing the release, without having first read it, as to estop him from asserting the truth as to the manner in which his signature was procured. The case of *Lusted v. Chicago etc. R'y Co.*, 71 Wis. 391, rested upon similar facts, and a like conclusion was reached by the court in that case. One who signs a paper purporting to be a written release discharging his right of action against a railroad company for injuries, and at the time of executing such release he is under the influence of drugs and opiates taken to alleviate his pains, to such an extent that he is rendered unable to read, and is mentally incapacitated to contract, such contract is not binding upon him, nor is he negligent in failing to have it read to him before he signs it: *Chicago etc. R. R. Co. v. Doyle*, 18 Kan. 58.

GAMBELL v. TRIPPE.

[75 MARYLAND, 252.]

WILLS — CONSTRUCTION OF CHARITABLE BEQUEST — INDEFINITENESS. —

When by the residuary clause of a will covering personal property the testator directs his trustees named in the will "to pay over the whole residue and remainder of his means and estate to some Presbyterian institution in Baltimore, as they may determine, for charitable or religious purposes," the bequest is void for indefiniteness as to the institution intended to be promoted or benefited and the purposes to which the fund is to be applied.

WILLS — CHARITABLE BEQUEST — WHEN LAPSES. — When by the residuary clause of a will the testator directs his trustees named in the will "to pay over the residue and remainder of his means and estate to some Presbyterian institution in Baltimore, as they may determine, for charitable or religious purposes," the power of selecting a beneficiary given to the trustees by the will is one limited to the persons named. Upon their death without exercising it, it devolves upon no one else. The bequest thus sought to be made then lapses, and the testator's next of kin are entitled to receive it.

POWERS — WHEN PERSONAL. — Whenever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom by legal transmission the same character may happen to belong.

Charles H. Quigley, for the appellant.

A. C. Trippe, for the appellee.

McSHERRY, J. By the fifth or residuary clause of the last will of Emma Spence it is provided as follows, viz.: "I direct my trustee to pay over the whole residue and remainder of my means and estate to some Presbyterian institution in Bal-

timore, as they may determine, for charitable or religious purposes." By the first clause she appointed Jesse K. Hines and James A. L. McClure trustees and executors, and devised and bequeathed all her estate to them upon various trusts, that relating to the residuum being the one just quoted. Mr. Hines died a few days after the testatrix, without having qualified as executor, and letters testamentary were issued to Mr. McClure, who subsequently died without having stated an account, and without having administered the estate. Thereupon letters of administration *de bonis non cum testamento annexo* were committed to the appellant, who has passed his final account, showing in his hands a balance which constitutes the residuum of the estate. Neither Mr. Hines nor Mr. McClure ever designated any Presbyterian institution to receive this residuary legacy, and the father of the testatrix, her next of kin, claims it as a lapsed legacy. He has assigned his right therein to the appellee, who filed the bill now before us. The object of the proceeding is to have the residuary legacy declared lapsed, and to procure a decree directing the fund and personal property to be paid and delivered to the appellee.

There is no doubt as to the invalidity of the residuary clause of the will. The object intended to be benefited or promoted is neither so certain nor definite as to enable a court of equity to declare who is entitled to the fund to the exclusion of all others. The legacy is required to be paid to some Presbyterian institution for religious or charitable purposes; but what institution or what character of institution, whether religious, educational, or charitable, is nowhere declared or intimated; and the purposes to which the fund is to be applied, whether religious or charitable, are as indefinite and uncertain as the institution is. It was said by this court in *Barnum v. Mayor*, 62 Md. 292, 50 Am. Rep. 219: "If there be parties capable of taking the subject-matter of the trust, and objects legal and definite to be subserved or benefited by its execution, so that a court of equity may take cognizance of and enforce the trust, these are the essentials, and only essentials, to the validity of the trust, though the object of the trust be in its nature charitable." Not one of these essentials is present in this case, and according to the well-settled doctrine in this state the trust cannot be upheld, even though the trustees named in the will were empowered to select the institution ultimately to receive the fund: *Dashiell v. Attorney-General*, 5 Har. & J. 392; 9 Am. Dec. 572; 6 Har. & J. 1;

Wilderman v. Mayor, etc., 8 Md. 551; *Needles v. Martin*, 33 Md. 609; *Church Extension of M. E. Church v. Smith*, 56 Md. 399; *Rizer v. Perry*, 58 Md. 112; *Crisp v. Crisp*, 65 Md. 426; *Maught v. Getzendanner*, 65 Md. 527; 57 Am. Rep. 352; *Dulany v. Middleton*, 72 Md. 67.

But in addition to this, the power given by the testatrix to Mr. Hines and Mr. McClure to select some Presbyterian institution as the beneficiary under the residuary clause was purely one limited to the persons named. It was a discretion vested in them individually. They both died without attempting to exercise it, and it has devolved upon no one else. Whenever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong: *Cole v. Wade*, 16 Ves. 27; *Attorney-General v. Berryman*, 1 Dick. 168; *Powles v. Jordan*, 62 Md. 503. As a consequence of this, even had the bequest been valid in the first instance, the legacy would have lapsed. In either event, whether void or lapsed, the father of the testatrix as her next of kin became entitled to the fund and personal property attempted to be disposed of by the residuary clause, and under the assignment from him the appellee may recover that fund and personal property from the administrator *de bonis non*. This is what the court below decreed, and for the reasons we have given its decree must be affirmed.

CHARITABLE BEQUESTS, WHEN VOID FOR UNCERTAINTY: See note to *Bridges v. Pleasants*, 44 Am. Dec. 98-101. It is there stated that the courts are not entirely agreed as to the validity of charities where the precise ascertainment of the beneficiaries is left to the discretion of trustees, and illustrative cases are given. In the later case, *Minot v. Baker*, 147 Mass. 348; 9 Am. St. Rep. 713, it was held that a gift to a person of moneys or property, "to be disposed of by him for such charitable purposes as he shall think proper," is a good charitable trust. On the other hand, a devise of the testator's property to such charitable institutions and in such proportions as his executors and J. H. should choose and designate was held void in *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748.

POWERS, WHEN PERSONAL. — Where a power is to be exercised entirely at the discretion of the donee, courts of equity have no jurisdiction to force him to act, and if he has died without exercising the power, they cannot confer it on a trustee appointed by the court: *Young v. Young*, 97 N. C. 132. So also a power of sale annexed to a devise of the fee to be exercised at the discretion of the devisee, and without designating any particular object for which it should be exercised, expires at the death of the devisee: *Sites v. Eldredge*, 45 N. J. Eq. 632; 14 Am. St. Rep. 769.

GORDY v. NEW YORK, PHILADELPHIA, AND NORFOLK RAILROAD COMPANY.

[75 MARYLAND, 297.]

RAILROADS — RULES — PAROL EVIDENCE TO SHOW APPLICATION OF. —

When rules furnished to railroad employees by the company are intended to be enforced for the protection of the train, the public, and all those engaged in conducting the movement of the train, extrinsic evidence is inadmissible to show to what state of case they are applicable, or how they should be applied, in the absence of any ambiguity in their terms.

RAILROADS — DUTY OF EMPLOYEE TO CONFORM TO RULES. — When an employee, on entering the service of his employer, accepts a book of rules prescribing his duties and the manner of performing them, he obligates himself to observe and conform to them according to their plain terms, and not according to what may have been a customary practice among other employees, regardless of the express requirements of such rules.

RAILROADS — INJURY TO BRAKEMAN THROUGH VIOLATION OF RULES — EVIDENCE OF CUSTOM. — When the rear brakeman or flagman on a freight train is furnished with rules by the company declaring his post to be on the last car, which he must not leave except to protect the train, and which require him not to leave his brakes while the train is in motion, nor to take any other position thereon than that assigned him by the conductor, he must conform to such rules, and in case of injury sustained by him in going from the inside of the car to the top thereof by means of ladder strips, evidence to show that it is customary for rear brakemen to ride inside the rear car is inadmissible, in an action brought by him to recover damages.

Robert P. Graham and H. L. D. Stanford, for the appellant.

John W. Crisfield, for the appellee.

ALVEY, C. J. This action was brought to recover for an injury suffered by the plaintiff, while acting as rear brakeman on a freight train of cars of the defendant, and which injury was caused, as alleged, by the negligence of the defendant.

It was shown in proof that the plaintiff was in the service of the defendant in 1886, as rear brakeman or flagman, and that, on the night that the accident occurred, the train on which the plaintiff was employed was moving from Delmar, and was approaching Salisbury; that he was in the rear car with the conductor, in the act of cleaning one of his lamps, when the whistle sounded, and the conductor told him he had better go to his brakes, one of which was on the top of the car and the other was on the platform at the end of the car, and neither of these brakes could be reached except by going from the inside to the top of the car and then to the one on the

platform; that, in ascending the side of the car, where ladder strips were placed to get on top of the car, he was struck by the projecting roof of a freight shed erected on the platform of the road of the defendant, between the track on which the train was running and the track of the Wicomico and Pocomoke Railroad; that he was seriously injured, and disabled to work for several weeks. The plaintiff also proved that the car on which he was at the time he was directed to go to the brakes was the rear car of the train, and that it had no door at the end, and there was no way to get on top of the car except by leaving the inside by way of the side door, and from thence getting on top of the car, as he did by the ladder strips. That he had complained to the train master of this state of things, and that the latter had promised that a different kind of car, or caboose car, should soon be furnished.

The plaintiff, in his testimony, referred to the rules of the defendant, furnished to the plaintiff and other employees, for their government in the performance of their duties; and identified the book of rules produced as that with which he had been furnished, and which rules were in force at the time the accident occurred.

Among the rules prescribed for the government of freight conductors is No. 227, which declares: "They must station the brakemen at their respective posts on their trains, and see that they keep their positions and use the brakes properly, particularly when descending heavy grades": and among the rules prescribed for the government of brakemen on freight trains are these:—

"244. They must not leave their brakes while the train is in motion, nor take any other position on the train than that assigned them by the conductor."

"246. The post of the rear brakeman (or flagman) is on the last car in the train, which he must not leave except to protect the train. He must be provided with and display the required signals on the rear of the train, and in case of detention or accident must immediately go back, as per rules Nos. 93 and 95, without waiting for a signal from the engineman or instructions from the conductor. The front brakeman is charged with the duty of protecting the front of the train in like manner whenever the fireman is unable to leave the engine."

In the course of the trial two exceptions were taken by the plaintiff, both from rulings upon questions as to the admissibility of parol evidence offered by him to show in what man-

ner the rules recited had been construed and applied in practice by the employees of the defendant. The court rejected the proffered evidence as being inadmissible to control the terms of the rules furnished the employees of the defendant for their government while on duty; and in these rulings we perceive no error.

There does not appear to be any ambiguity in the terms of these rules, such as would justify the admissibility of extrinsic evidence to show to what state of case they are applicable, or how they should be applied. They are intended as means to be enforced for the protection of the train, the public, and all those engaged in conducting the movement of the train; and therefore no lax or variable construction of such rules should be allowed. The plaintiff, when he entered the service of the defendant and accepted the book of rules prescribing his duties and the manner of performing them, obligated himself to observe and to conform to such rules, according to the plain terms thereof, and not according to what may have been a customary practice among other employees, regardless of the express requirements of the rules. By the evidence offered and rejected, it was attempted to be shown that it was customary for the rear brakeman or flagman to ride inside of the rear car; and that since the accident a car or caboose is used by the defendant on this route, so constructed that if the brakeman or flagman should ride on top he would be unable to get to his brakes. This testimony was quite immaterial on questions as to the proper construction of the rules; and the court did right in excluding it from the jury. The plain requirement of rule 244 is, that the brakeman shall not leave his brakes while the train is in motion, nor take any other position on the train than that assigned him by the conductor; and by rule 246 it is declared that the post of the rear brakeman or flagman is on the last car in the train, which he must not leave except to protect the train. His position is a most important one, next to that of the engineman himself. His duty is to protect the train, and all following trains, both by the use of signals and the application of the brakes; and he should be, as the rule requires, constantly in position to use the means at his command to accomplish the objects intended. This important duty could hardly be performed by a person who rides inside a closed or box-car, from which there is no exit, except from a side door, and thence by ladder strips to the top of the car. The brake on the platform, or on

the top of the car, were positions at which the plaintiff was required to be, and not to be closed up inside the car.

Judgment affirmed.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF INJURED EMPLOYEE—VIOLATION OF RULES.—The general principle is that no recovery can be had by the injured servant, or by his representatives, when death results, if the injury was the consequence of disobedience to the regulations published by the employer: *Darracott v. Chesapeake etc. R. R. Co.*, 83 Va. 288; 5 Am. St. Rep. 266; *San Antonio etc. R'y Co. v. Wallace*, 76 Tex. 636; *Eastburn v. Norfolk etc. R'y Co.*, 34 W. Va. 681; *Shenandoah Valley R. R. Co. v. Lucado*, 86 Va. 390; *Sedgwick v. Illinois Cent. R'y Co.*, 76 Iowa, 340; *Railway Co. v. Wilson*, 88 Tenn. 316. But the omission of another servant to perform a duty imposed upon him by certain rules cannot convict the injured servant of negligence: *Murphy v. New York etc. R. R. Co.*, 118 N. Y. 527. The main exception to this principle is that the servant may still recover, if the injury would not have been avoided even though the rule had been observed: *Reed v. Burlington etc. R'y Co.*, 72 Iowa, 166; 2 Am. St. Rep. 243. Thus a brakeman who goes between the cars to make a coupling with his hands, in violation of a rule of which he has notice, is not precluded from recovery if the evidence shows that the engineer, knowing his position and danger, fails to use ordinary care to avoid injuring him: *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68. The burden of proof in such a case is on the employee to show that his disobedience to the rules did not contribute to the injury: *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263. Where the contributory negligence of the plaintiff in violating rules is set up as a defense, the plea is demurrable, unless it avers that the plaintiff had knowledge or notice of the rules: *Louisville etc. R. R. Co. v. Hawkins*, 92 Ala. 241; for rules not brought to his notice are not admissible for the purpose of charging him with negligence: *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47. In *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610, it was held that evidence of an established usage at variance with the rules, which was known and acquiesced in by the superior officers of the company, was admissible to show an abandonment of the rule to the extent of the usage.

COVER v. MYERS.

[75 MARYLAND, 406.]

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION OF—BURDEN OF PROOF.

When the fraudulent inception of a note is shown, the burden of proof is on the person claiming to be a *bona fide* holder to show under what circumstances he acquired it.

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION OF—RIGHTS OF BONA FIDE HOLDER.

—When a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation and no other falls with it; but if any subsequent holder takes the instrument in good faith and for value before maturity, he is entitled to recover on it, and so any person taking title under him may

recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is that it be proved that he, or some preceding holder or indorsee under whom he claims, acquired title to the paper before maturity, *bona fide* and for value.

NEGOTIABLE INSTRUMENTS — BONA FIDE HOLDERS OF. — When negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with like immunity, unless the paper is absolutely void; as when issued by parties having no authority to contract, or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction.

NEGOTIABLE INSTRUMENTS — PROOF OF FRAUDULENT INCEPTION OF. — Knowledge of the fraudulent origin of a note may be shown to have been possessed by the parties either by direct proof, or by facts and circumstances that fairly lead to that conclusion, and circumstances that are not of any great probative force in themselves are admissible in connection with other proof to show guilty knowledge or want of good faith.

JURY TRIALS — INSTRUCTIONS WHEN PROPERLY REFUSED. — Request for instructions on the part of a party, each segregating a certain fact, and asking the court to declare that such fact is not legally sufficient to authorize a finding against the proof of such party, and that the jury is not at liberty to consider such fact to defeat the right of such party to recover, is properly refused.

JURY TRIALS — INSTRUCTIONS WHEN PROPERLY REFUSED. — Prayers for instructions already covered, and embraced in instructions given for the same party, are properly refused.

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSERS. — The indorser of a note drawn payable to the bearer incurs the same liability and obligation as the indorser of a note drawn payable to order.

NEGOTIABLE INSTRUMENTS — BONA FIDE INDORSEE. — When the holder of a note payable to bearer exacts from the indorser a guarantee of indemnity, he may still occupy the position of a *bona fide* indorsee. The motive and purposes to be accomplished by such transaction form a question solely for the jury to determine.

William H. Thomas and William P. Maulsby, for the appellant.

Harry M. Clabaugh, D. N. Henning, and William A. McKellip, for the appellee.

ALVEY, C. J. This is an action brought by the appellant against the appellee to recover the amount of a promissory note, dated the 11th of July, 1887, for \$150. The note was made payable on the first day of August, 1888, to P. Huddle, or bearer, at the First National Bank of Westminster. The note bears the indorsement on its back, in blank, of William B. Thomas; though the date of the indorsement does not appear; nor is it shown under what circumstances or for what consideration the note was passed or transferred from Huddle to Thomas.

It appears that the note was given for the price of fifteen bushels of seed wheat, which the defendant was induced to agree to purchase of "The Carroll County Industrial, Grain, and Seed Company," of which P. Huddle was president. At the time of taking the note, the agent acting for the company represented to the defendant that if he, the defendant, would buy fifteen bushels of Barnhouse's wheat, he, the agent, would sell for the defendant double the quantity the latter bought, at \$10 a bushel, with \$2.50 a bushel off, as commission, in time to pay off the note; and at the time of such agreement and the making of the note, the agent delivered to the defendant the following bond:—

"No. 3.

PLEASANT VALLEY, July 11, 1887.

"The Carroll County Industrial, Grain, and Seed Co., incorporated under the laws of Maryland, P. Huddle, president, C. J. Stewart, secretary, Wm. A. Wampler, treasurer, doth hereby agree to sell thirty bushels of Seneca Chief Wheat for Mr. William Myers, of Jno., of Uniontown Dis., Carroll County, State of Md., at ten dollars per bushel in good notes, less \$2.50 per bushel commission, on or before the first day of July, 1888. We make no monetary statements, and the person accepting this bond acknowledges to have purchased the grain at a speculative value.

[SEAL.]

"P. HUDDLE, President."

The defendant was assured by the agent that the note would not have to be paid until the bond was redeemed. That some time afterward the defendant received fifteen bushels of wheat, but which was of an ordinary kind; that the defendant never afterward saw the agent or the parties he represented; and there was no offer or attempt whatever to sell any portion of the product of the wheat for which the note was given, as was obligated to be done by the bond.

It further appears in evidence that William B. Thomas, the indorser on the note sued on, was, at the time of such indorsement, a broker and dealer in notes and other paper, in the town of Westminster, in Carroll County, and that he was a man of reputed wealth; that on the 19th of June, 1888, he left home, taking with him fifty-six promissory notes of various makers, including the note sued on in this case; but whether all the notes were made to the same payee the record does not disclose, except by implication or inference; and which notes in the aggregate amounted to eight thousand four hundred dollars, including interest to the 21st of June, 1888;

and with said notes he went to the house of the plaintiff, near Front Royal, in the State of Virginia, a distance of about 140 miles from Westminster, and then and there, upon agreement, he indorsed and transferred all the fifty-six notes to the plaintiff, for the sum of \$7,907.98, at a discount of five and a half per cent on the eight thousand four hundred dollars. All the notes were near maturity, but none were in fact overdue; and a day or two after this transfer of the notes, the plaintiff transmitted them to the Union National Bank of Westminster for collection; and upon default of payment being made when due, he directed that the notes should be placed in the hands of an attorney at Westminster for suit, including the note sued on in this case. In this bank, Thomas, the indorser, kept his account, and to the credit of which were deposited the money and checks which he received of the plaintiff on the transfer of the notes. The plaintiff's principal business is that of conducting or carrying on a tannery at his home in Virginia, and running a grocery store in connection therewith; and he says he occasionally buys notes and speculates in Virginia lands. The notes indorsed to him by Thomas were all made by Maryland people, and only some of such makers were known to the plaintiff; and it may be inferred from the fact that all the notes were sent to a Westminster bank for collection, that the makers were mostly if not all residents of that vicinity.

The principal testimony in the case, as disclosed by the record, was given by the plaintiff himself. He testified to what may seem somewhat remarkable, that Thomas did not state anything about the consideration of the notes, or how they were obtained, and that he, the plaintiff, had no knowledge on the subject, and made no inquiry as to the consideration upon which they were founded, or how they were obtained; that he had no knowledge at that time of any fraud in obtaining the notes, and had never before heard of P. Huddle, or of any business that he was engaged in; but he bought the notes solely because he had the money to spare from his business of tanning, and wished to invest the same, and thought that the interest to accrue on the notes and the discount of five and one half per cent would be a good profit on his money. He paid Thomas for the notes by a check on the Bank of Warren, in Virginia, and which check was duly paid in money and checks or drafts.

At the time of the transfer of these notes by Thomas to the plaintiff, and as part of the same transaction, Thomas, on re-

quest of the plaintiff, executed and delivered to the latter the following agreement or guarantee:—

“BROWNTOWN, VA., June 19, 1888.

“I agree that, provided there be any costs in collecting any of the foregoing fifty-six notes, I will refund any and all amount of costs to the said F. P. Cover; also agree that provided any of said notes should fail to be paid to said F. P. Cover, or order, when due, that I will refund him said amt. of money which may be due him on any such notes, with all costs which may be upon same, after he having made an effort to collect same from the makers, and fails.

“WM. B. THOMAS.”

The record does not show that either Huddle, the payee of the note, or his agent who obtained it from the defendant, or Thomas, who indorsed the note to the plaintiff, appeared as witnesses; but the case of the plaintiff was mainly rested upon the ordinary presumptions that obtain in favor of the rights of innocent holders of negotiable paper acquired before maturity; but in this case there is an element introduced by the proof that modifies, to a certain extent, those ordinary presumptions. That the note had a fraudulent inception is clear beyond doubt; and upon this being shown, it was incumbent upon the plaintiff to show under what circumstances he acquired title to the note. That the note would have been fully embraced by the act of 1883, c. 415, passed for the purpose of preventing, and also for punishing such frauds, but for the fact that the note antedates the statute, is clear. The case falls fully within the principles of the case of *Griffith v. Shipley*, 74 Md. 591. It is a well-settled doctrine, applicable to these cases, that where a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it; but if any subsequent holder takes the instrument in good faith and for value, before maturity, he is entitled to recover on it, and so any person taking title under him may recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is, that it be proved that he, or some preceding holder or indorsee under whom he claims, acquired title to the paper before maturity, *bona fide* and for value: *Commissioners etc. v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 U. S. 753.

Therefore, if Thomas, under whom the plaintiff asserts title to the note, was in fact a *bona fide* purchaser or holder of the note for value, then the plaintiff, notwithstanding any knowledge that he may have had at the time of the indorsement to him, of the fraudulent origin of the note, would be entitled to recover by virtue of the right acquired from Thomas. In such case the plaintiff would succeed to all the rights of Thomas, and would be entitled to enforce them. For the rule is now well settled, as laid down by the supreme court of the United States in *Cromwell v. County of Sac*, 96 U. S. 51, 59, "that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as the one which protects the purchaser without notice, says Judge Story, 'is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy': Story on Promissory Notes, sec. 191. The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction." The same doctrine has been very fully adopted by the former court of appeals of this state in the case of *Boyd v. McCann*, 10 Md. 118.

It was therefore incumbent upon the plaintiff, to entitle him to recover, to prove either that he became *bona fide* purchaser of the note for value before maturity, or that he purchased the note from Thomas, and that the latter had acquired title to the note *bona fide* and for value, before maturity, and that it was as successor to the right and title of Thomas that he sought to recover. If, however, Thomas was but an agent of Huddle to get off the paper, the note being payable to bearer, the title of Thomas would be no better than that of his principal, and his title to the note would be infected with the fraud of the origin of the note: *Solomons v. Bank of England*, 13 East, 135. But whether Thomas was agent or not, if both he and the plaintiff had knowledge of the infirmities or fraudulent origin of the note at the time they respectively became holders thereof, or if they colluded together for the purpose of avoiding the effect of such knowledge and of placing a col-

orable title in the plaintiff, to enable him to sue for the recovery of the note, then clearly there can be no recovery by the plaintiff; and such knowledge of the fraudulent origin of the note may be shown to have been possessed by the parties either by direct proof, or by facts and circumstances that fairly lead to that conclusion.

Keeping these principles in view, there is no difficulty in disposing of the several questions raised by the exceptions taken by the plaintiff. Some of the exceptions were taken to the admissibility of evidence, and others to the refusal to grant prayers offered by the plaintiff, and to the granting of several instructions on the request of the defendant.

The circumstances offered and relied on, as stated in the first five bills of exception, we think were properly admitted. They were not of any great probative force of themselves, it is true, but as circumstances to be considered in connection with other proof, reflecting upon questions of knowledge and good faith, they were admissible, and we perceive no error in the rulings in these exceptions.

There was certainly no error committed by the court below in rejecting the third, fourth, and fifth prayers offered by the plaintiff. Those prayers each segregated a certain fact or circumstance, and asked the court to declare that such fact or circumstance was not legally sufficient to authorize the jury to find against the proof of the plaintiff, and that the jury should not be at liberty to consider such fact or circumstance to defeat the right of the plaintiff to recover. This mode of dealing with separate pieces or items of evidence, segregated from all the other evidence of the case, is wholly unwarranted, and has no support in any principle of reason. The strongest case or defense, proved by a combination of facts, might be overcome and destroyed by that method of dealing with the separate facts or items of proof; and for like reason that the prayers just mentioned were rejected, the court was right in rejecting the sixth and twelfth prayers of the plaintiff. The seventh and eighth prayers, as presented, were calculated to mislead the jury, and therefore properly refused.

By the ninth prayer of the plaintiff the court was asked to instruct the jury that they could not impute to the plaintiff bad faith in the purchase of the note sued on, even though they might believe from the evidence that Thomas, at the time of the transfer of the note to the plaintiff, had notice of the fraud practiced upon the defendant by Huddle or his agent;

and by the eleventh prayer the court was asked to instruct that there was no legally sufficient evidence in the cause from which the jury could find that Thomas, at the time he indorsed the note to the plaintiff, had knowledge of the fraudulent manner by which said note had been obtained from the defendant or that the same was without consideration; and further, by special exceptions to the defendant's prayers for instruction, the plaintiff resisted the granting thereof, because, as alleged, there was no legally sufficient evidence in the cause from which the jury were at liberty to find that the plaintiff had knowledge, at the time he purchased the note, that the same had been obtained by fraud from the defendant.

These propositions, taken together, required the court to instruct the jury that there was no evidence legally sufficient upon which it could be found that either Thomas or the plaintiff had knowledge of the fraudulent origin of the note at the time it was taken by them respectively, and therefore the verdict should be for the plaintiff; but such an instruction would have been wholly unwarranted, and the court therefore was clearly right in refusing it. There was evidence legally sufficient to be considered by the jury, of knowledge of the fraudulent origin of the note, on the part of both Thomas and the plaintiff; and the court could not do otherwise than allow it to be considered by the jury. As the case will have to be retried, we shall refrain from comment upon the facts and circumstances of the case; but portions of such evidence are referred to in the prayers of the defendant granted by the court.

The tenth prayer offered by the plaintiff would seem to be unobjectionable in principle; but there was no error in rejecting it by the court. It had been fully embraced and covered by the plaintiff's first and second prayers, which had been granted by the court. The repetition of the same proposition, though in different phraseology, would have answered no useful purpose, and could only have served to encumber the case and embarrass the jury.

We perceive no error in any of the prayers of the defendant granted by the court, except the third and the sixth. In these two just mentioned, we think there was substantial error. By the third prayer the jury were instructed, that if they believed from the evidence the note sued on had been obtained from the defendant by fraud, then the verdict must be for the defendant, unless they should further find that the note had

been obtained by the plaintiff without knowledge of such fraud at the time he purchased the note; and that it was incumbent upon the plaintiff to show such want of knowledge on his part by preponderating proof.

This instruction entirely ignored the right of the plaintiff to stand upon and assert the rights of Thomas, the indorser, to whose rights the plaintiff succeeded, in the event that the jury might find that Thomas was an innocent and *bona fide* holder of the note. The instruction, by the terms in which it was granted, cut off and entirely precluded the plaintiff from any possible right resulting from the good faith of Thomas, if the jury should find such to have existed in his acquiring title to the note. In this we think there was error. And so in regard to the sixth prayer, the plaintiff was confined to the *bona fides* of his own conduct in acquiring title to the note, without any reference to or dependence upon what may have been a good and *bona fide* title acquired by Thomas, to which the plaintiff succeeded by indorsement.

It is contended, however, by the defendant, that the plaintiff is not entitled to occupy the position of indorsee of the note; that at the time of the transfer of this and other notes to the plaintiff the latter exacted and took from Thomas a guaranty of idemnity, and that it was upon that and not the indorsement that he relied in taking the notes and paying the money to Thomas; and in support of this contention the defendant cites and relies on the case of *Trust Co. v. National Bank*, 101 U. S. 68. But that case is quite unlike the present. There the note was not indorsed to the trust company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. The payment of the note was merely guaranteed, and the court held that not to be in effect equivalent to an indorsement. Here, though the note was payable to Huddle or bearer, it was indorsed by Thomas to the plaintiff, and in such case, the indorser incurs the same liabilities and obligations as the indorser of a negotiable note, payable to order: Story on Promissory Notes, sec. 132. And while it is difficult to perceive why the individual guaranty of Thomas should have been taken, when he had indorsed the notes in a manner to secure to the plaintiff all the liability of a commercial indorsement of the paper, yet the motive, and purposes to be accomplished by such transaction, form a question, in a case circumstanced like the present, solely for the jury.

It follows, from the foregoing review of the case, that for the errors in the third and sixth instructions granted for the defendant, the judgment must be reversed and a new trial awarded.

NEGOTIABLE INSTRUMENTS—BURDEN OF PROOF.—When the inception of commercial paper is tainted with fraud, the burden of proof lies on the holder to show that he took it for value, in good faith, and before maturity: *Vosburgh v. Dieffendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Joy v. Dieffendorf*, 130 N. Y. 6; 27 Am. St. Rep. 484, and note; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Commercial Bank v. Burgwyn*, 108 N. C. 62; 23 Am. St. Rep. 49; *Henry v. Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580; *MacLaren v. Cochran*, 44 Minn. 255; *Mace v. Kennedy*, 68 Mich. 389; *Haggland v. Stuart*, 29 Neb. 69.

NEGOTIABLE INSTRUMENTS—RIGHTS OF BONA FIDE HOLDERS.—A bona fide holder of a negotiable instrument may transfer good title thereto to one who has notice of the fraudulent character of the paper: *Vosburgh v. Dieffendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242. The same rule holds where the infirmity of the paper is a want of consideration: *Hascall v. Whitmore*, 19 Me. 102; 36 Am. Dec. 738. So also if the transferrer of a note has purchased it in good faith and before maturity, his transferee, who purchases it after maturity, is invested with all his rights: *Howell v. Crane*, 12 La. Ann. 126; 68 Am. Dec. 765; *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340.

TRIAL.—INSTRUCTIONS AS TO MATTERS CONCERNING WHICH A CHARGE HAS ALREADY BEEN GIVEN should be refused: *Smith v. Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699; *Virginia Midland R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874; *Austin etc. R'y Co. v. Anderson*, 79 Tex. 427; 23 Am. St. Rep. 350; *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731.

NEGOTIABLE INSTRUMENTS.—INDORSEMENT IN BLANK vests the right of action and all other rights in the transferee and subsequent holders: *Sterling v. Bender*, 2 Ark. 201; 44 Am. Dec. 539; *Abat v. Rion*, 9 Mart. 465; 13 Am. Dec. 313; *Rees v. Conococheague Bank*, 5 Rand. 326; 16 Am. Dec. 755; and creates the same liability from indorser to indorsee as if it were full: *Bean v. Briggs*, 1 Iowa, 488; 63 Am. Dec. 464.

PEOPLE'S BANK v. MORGLOFSKI.

[75 MARYLAND, 432.]

ELEVATORS—NEGLIGENCE IN MANAGEMENT OF.—When, in an action to recover for injury received in falling down the shaft of a freight and passenger elevator owned and controlled by the owner of a building or his agent, it is shown that the plaintiff, who was employed by a tenant of the landlord owning the elevator, was injured by walking into the elevator shaft under the supposition that the elevator was there, because the door of the shaft was open and the bar pulled back, and it was too dark for him to see whether the elevator was there or not, the evidence is sufficient to establish the negligence of the owner of the elevator in failing to exercise that ordinary and reasonable caution and vigilance in

keeping the elevator door closed to prevent injury to those entitled to ride in the elevator.

ELEVATORS — DEGREE OF CARE REQUIRED IN MANAGEMENT OF. — One who owns and operates an elevator, either by himself or his agent, is bound at all times to use reasonable care and caution to make it safe for all persons who have a right to use it, or who use it with the owner's knowledge and consent.

ELEVATORS — LIABILITY OF OWNER. — When an elevator remains under the control of the owner of the building, he is liable to his tenants for any defect in it, or in its appointments or management, which reasonable care and vigilance can prevent.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR COURT OR JURY. — Ordinarily the question of contributory negligence is for the jury to determine, but sometimes it becomes the duty of the court to instruct that in spite of the negligence of the defendant the plaintiff cannot recover. This responsibility will never be assumed, however, unless the case is a very clear one and presents some prominent and decisive act in regard to the effect and character of which ordinary minds cannot differ.

ELEVATORS — DEGREE OF CARE REQUIRED OF PERSON USING. — An elevator for the carriage of persons is not supposed to be a place of danger to be approached with great caution. On the contrary, it may be assumed, when the door is open, to be at a place which may be safely entered, without making any special examination or stopping to look and listen.

ELEVATORS — CONTRIBUTORY NEGLIGENCE IN USING WHEN QUESTION FOR JURY. — When a person entitled to use an elevator is injured by falling down the shaft thereof into which he walked under the supposition that he was stepping into the elevator, because the door thereof was open and the bar pulled back, although it was so dark that he could not see whether the elevator was there or not, the question of whether or not he was guilty of contributory negligence in walking into the shaft without first ascertaining if the elevator was at that place is properly submitted to the jury for its determination.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY. — When considerable doubt exists as to whether or not the plaintiff is guilty of contributory negligence, that question should be submitted to the jury for its determination.

ELEVATORS — CARE REQUIRED IN MANAGEMENT OF. — The owner of an elevator must operate it with reasonable care and vigilance, and one having the right to use it may assume that this duty is faithfully performed, and he is not required to exercise that degree of care and caution which could properly be demanded of him under other circumstances.

ELEVATORS — NEGLIGENCE IN MANAGEMENT OF — LIABILITY IN DAMAGES. — In an action to recover for injury received in falling down an elevator shaft, when the accident is caused solely by the negligence of the owner and operator of the elevator, the jury, in estimating the damages, is at liberty to consider the health and condition of the plaintiff before the accident as compared with his present condition in consequence thereof, and whether or not the injury received is in its nature permanent, and how far it is calculated to disable him from engaging in those pursuits and employments for which, in the absence of such injury, he would

have been qualified, and also to consider the physical and mental suffering to which he was subjected by reason of such injury, and to allow such damages as will be a fair and just compensation for the injury sustained.

ACTION to recover damages for injuries sustained in falling down an elevator shaft. The following instructions referred to in the opinion were given at the request of plaintiff: "1. The plaintiff prays the court to instruct the jury that if they find that the defendant is the owner of the building at the corner of Sharp and Lombard streets, described in the evidence; that it has constructed an elevator in the said building, which for a period of about six years, with the knowledge of the defendant, has been used by the tenants of said building, their customers and employees, for passenger service; that the plaintiff, at the time of the injury complained of, was an employee of Elias Rohr, who was a tenant in said building; that upon each floor of said building at the entrance of said elevator there is placed a sliding door with a bar across the same; that the said sliding door and bar are placed at the entrance of said elevator for the purpose of being opened as the elevator reaches the respective floors of said building to take in passengers, and to be closed as the elevator leaves the same to prevent accident; and that the plaintiff, on the twenty-fourth day of March, 1890, left the workshop of the said Rohr, and approached the entrance to said elevator, and the cross-bar had been thrown back at the said entrance and the sliding door thrown open, and the plaintiff was in the act of descending upon the said elevator when he was precipitated to the basement below; and if they further find that the approach to the elevator was not sufficiently lighted to enable any one exercising ordinary prudence to detect the absence of the elevator; that the servant who was in charge of the elevator had left the custody thereof, and that the plaintiff was exercising reasonable and ordinary caution at the time of the accident, and the said injury was occasioned by the want of ordinary care and prudence on the part of the defendant, then the plaintiff is entitled to a verdict. 2. If the jury find for the plaintiff, in estimating the damages they are at liberty to consider the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of such injuries, and whether the said injuries are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those pursuits and employments for which, in the

absence of said injuries, he would have been qualified; and also the physical and mental suffering to which he was subjected by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injuries which they may find the plaintiff has sustained." Judgment for plaintiff, and defendant appealed.

Robert Ludlow Preston and J. A. Preston, for the appellant.

Bernard Weisenfeld, John Prentiss Poe, attorney-general, and Isidor Rayner, for the appellee.

FOWLER, J. The appellant, who was defendant below, owns a building in the city of Baltimore, which is occupied by a number of tenants for business purposes. There is an elevator in this building which was used both for passengers and freight.

The plaintiff, now appellee, was employed by one of these tenants, and was seriously injured by falling from the fourth floor to the cellar through the elevator shaft.

For the injuries thus sustained the plaintiff sued the defendant in the superior court of Baltimore City, and recovered judgment. From this judgment the defendant has appealed.

The two questions, as usual in cases of this kind, are: 1. Was the defendant guilty of negligence? and 2. Was the plaintiff guilty of contributory negligence?

At the close of the testimony, both parties having produced witnesses to sustain their respective contentions, the plaintiff offered two prayers, which were granted, and the defendant seven, four of which were rejected and three granted. Inasmuch as defendant's first prayer is a demurrer to the evidence, it will be necessary to examine the testimony at length.

At the time of the accident the plaintiff was working for a tenant of the defendant. He was proceeding up the stairway to the place of business of his employer on the fourth floor, when he heard the elevator going up the shaft. When he arrived at the fourth floor, he heard the elevator thrown open on that floor. Having accomplished the object of his visit, he returned to take the elevator, which was just outside the door of his employer's office. His testimony was that he could not see at all in the hall, and having heard the elevator go up, the door of the elevator being open and the bar back, he was sure the elevator was in its place. He stepped in to take the elevator, and fell down five floors, into the basement,

and was seriously and permanently injured, as set forth in the testimony.

This elevator was used every day for the people employed by the various tenants, and the boy in charge of it who was employed by the defendant, daily brought down the working people from the upper stories of the building. There was a painted window on one side of the elevator, and it was very dark there; there was no gaslight there, and the distance from the door out of which the plaintiff came on his way to take the elevator is only about two feet from the elevator door. On re-examination, the plaintiff said he heard the elevator door thrown open; that he was sure the elevator was there, and that it was so dark that he could not see whether it was there or not. The elevator boy was not in charge at the time of the accident, nor was he aware of it until informed by one of the witnesses.

Several of the plaintiff's witnesses testified that this boy did not attend to his duties properly, and that he was frequently called when he was not at his post. The attention of the defendant, through its cashier, was called to these facts, and also to the fact that the shaft was frequently left open. The place around the elevator door was dark when coming out of a light room.

On the part of the defendant it was shown that on the day of the accident the elevator boy left the building before twelve o'clock, and went to his dinner. The boy testified that on that day he cut off the water, and put the elevator in the cellar. On his return, he found the plaintiff lying in the cellar, and the elevator at the sixth floor of the building. He did not know how the elevator got there, but said that "the people" would run the elevator when he was at dinner, and that one of the workmen told him that some of the people, "whoever it was," did not keep the gates fastened. One of the witnesses testified that this boy was a worthless and careless fellow, "and that he was a most disgraceful liar."

The defendant also offered testimony tending to show that the elevator in question was an ordinary freight elevator, and that it was not safe for passengers, and the cashier of the defendant denied that he had been warned of the danger. He believed that Ross, who was in charge of the elevator, was a correct boy, and he had given him repeated instructions that the elevator should be used only for freight. The people in the building had often run the elevator themselves. He ad-

mitted, however, that he knew the elevator had been used as a passenger elevator to carry the people employed in the building, but he said he was under the impression that the defendant had no control over it. Although he was aware the elevator was so used for six years, he never gave notice of any kind that it was for freight alone.

Upon these and other facts, not necessary further to refer to, it was submitted to the jury by the instructions of the court to find whether the defendant was guilty of negligence, and, if so, whether the plaintiff was guilty of such contributory negligence as would prevent him from recovering, notwithstanding the negligence of the defendant.

In the first place, it is very clear from the foregoing recital of the facts given in evidence that there was testimony before the jury tending to prove, if the jury believed it, that the defendant did not use that reasonable caution and vigilance which is required in the management of an elevator, which like the one described by the witnesses was used both for passengers and freight. The elevator was in charge of and operated by the defendant's agent, and it was bound at all times to use reasonable caution and care to make the elevator safe for all persons who had a right to use it, or who did in fact use it with defendant's knowledge and consent: *Engel v. Smith*, 82 Mich. 1; 21 Am. St. Rep. 549.

This reasonable rule is also laid down in *Shearman and Redfield on Negligence*, sec. 719, where it is said that, although elevator shafts and openings are now very generally used in warehouses and other places of business, they are dangerous, especially if located in dark places, or in such close proximity to doors that a person entering the door may step into them unawares; and it is also said that "when elevators remain under the control of the owner of the building he is liable to his tenants for any defect in them, their appointments, or their management, which reasonable care and vigilance would have prevented."

It must be admitted that the exercise of the most ordinary care by the defendant in this case would have resulted in keeping the elevator door closed, and in preventing the injury to the plaintiff.

But in regard to the other question, whether the plaintiff was guilty of contributory negligence, there is more difficulty and doubt.

Ordinarily, of course, the question of negligence is one for

the jury, but sometimes it becomes the duty of the court to instruct them that in spite of the negligence of the defendant the plaintiff cannot recover. The court, however, will never assume this responsibility unless the case is a very clear one and presents, as was said in the case of *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53, 48 Am. Rep. 88, and others decided by this court, "some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ." The act relied on here to show contributory negligence on the part of the plaintiff is the one established by his own testimony, namely, that he walked into the elevator shaft without looking to see if the elevator was there. He testified that he could not see at all, but that he was sure with the door open and the bar back, the elevator was in its place; and that it was so dark he could not see whether it was there or not. He does not say — he was not asked to say — whether he could see whether the elevator door was open, and the bar pulled back. The fair inference from his testimony is, that he could see that the elevator door was open, but could not see whether the elevator was or was not in its place. He says, "the door being open, and the bar back" he was sure the elevator was there.

It must be remembered that the hall was dark in front of the elevator, and that the distance from the door of the elevator to the door from which the plaintiff came was only one or two steps, or, as the witnesses say, from eighteen inches to two feet. He had, therefore, but a moment either to look or to think.

In the case of *Tousey v. Roberts*, 114 N. Y. 316, 11 Am. St. Rep. 655, it is said that "an elevator for the carriage of persons is not like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but, on the contrary, it may be assumed, when the door is opened by an attendant to be a place which may be safely entered without stopping to look, listen, or make a special examination."

And in *Dawson v. Sloane*, 49 N. Y. Sup. Ct. 304, affirmed in 100 N. Y. 620, it was held that where a tenant in an apartment house saw the owner's elevator boy sitting in a nodding position, and plaintiff, supposing the platform to be in its place, but failing to inquire or stop to examine and see, stepped in and fell to the bottom of the shaft, it was held to be for the jury to decide if the appearances were not such as to throw

the plaintiff off his guard; and a verdict for the plaintiff was sustained. In the course of its opinion in the case just cited, the court of appeals of New York say: "The injury occurred from the plaintiff stepping into and falling down the well of an elevator, when the elevator carriage was at an upper floor. . . . The elevator faced the street door. The plaintiff walked from the street door toward the elevator. He saw that the elevator door was open, as he had often seen it before, and that the boy who ran the elevator was sitting by the elevator. There was no gas burning at the place. It was so dark that the plaintiff could not see the boy's face, although he saw him in a nodding position. The plaintiff, supposing the platform to be there, stepped inside and fell to the bottom. It is claimed that under these circumstances it was apparent that there was danger, and that the plaintiff should have taken precautions, such as feeling whether the carriage was there, or waking the boy to ask him as to that fact, or getting in some other way information upon which he could safely proceed. This position is not valid." It is for the jury, says the court, to determine whether and to what extent the plaintiff might rely on the appearances presented.

And so we are of opinion that the court below properly left it to the jury to find whether, under all the circumstances of this case, the plaintiff had a right to assume that the elevator was at the fourth floor where he stepped into the shaft.

We do not mean to say it is a clear question, but, on the contrary, as we have already said, it is one of considerable doubt whether the conduct of the plaintiff constitutes such contributory negligence as should prevent him from recovering; and where such doubt exists, the question of contributory negligence is one of fact, to be determined, as it was in this case, by the jury: *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53; 48 Am. Rep. 88.

It was undoubtedly the duty of the defendant to operate the elevator in question with reasonable care and vigilance: *Engel v. Smith*, 82 Mich. 1; 21 Am. St. Rep. 549; *Shearman and Redfield on Negligence*, sec. 719; and the plaintiff had a right to assume that this duty would be faithfully performed.

So assuming, he would not be required to exercise that degree of caution which could properly and fairly be demanded of him under other circumstances. It is a sound rule of law, says Mr. Beach in his work on Contributory Negligence, page 41, that it is not contributory negligence not to look for dan-

ger when there is no reason to apprehend any. This principle is forcibly illustrated and applied in the recent cases of *Baltimore etc. R. R. Co. v. State*, 60 Md. 463, and *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 523; 20 Am. St. Rep. 483.

The first prayer granted on the part of the plaintiff fully and fairly submitted to the jury the question of negligence and contributory negligence, and the second properly instructed them on the measure of damages.

The defendant's first prayer asked the court to say that there was no legally sufficient evidence of negligence, and the second and third, that the plaintiff was guilty of contributory negligence, and was not entitled to recover.

In view of the authorities above cited, and for the reasons we have already given, we are of opinion that these prayers of the defendant were properly refused and those of the plaintiff were properly granted.

Defendant's seventh prayer was properly refused, because, as we have seen, there was evidence before the jury tending to show that the defendant did authorize the use of the elevator for carrying passengers. Defendant's special exception to plaintiff's first prayer, on the ground that there was no evidence of the right of the plaintiff to use the elevator, is not properly before us, because it is not contained in the bills of exception signed and sealed by the trial judge.

Finding no error, the judgment appealed from will be affirmed.

ELEVATORS — DEGREE OF CARE REQUIRED IN MANAGEMENT OF. — A person running an elevator in his place of business must be held to undertake to carry persons riding therein as safely as human skill and foresight can do; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175, and note. An elevator for the carriage of persons is not supposed to be a place of danger to be approached with great caution, but it may be assumed that when the door is thrown open the place may be safely entered without special examination; *Tousey v. Roberts*, 114 N. Y. 312; 11 Am. St. Rep. 655, and note. See *Patterson v. Hemenway*, 148 Mass. 94; 12 Am. St. Rep. 523, and *Moll v. Riverside Storage etc. Co.*, 82 Mich. 389, for discussions as to the liability of landlords for person falling through unguarded elevator shafts.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR COURT. — When no other inference than that of negligence can be drawn from the evidence, it should be declared by the court as a matter of law; *Cocoran v. St. Louis etc. R'y Co.*, 105 Mo. 399; 24 Am. St. Rep. 394, and note; *Weber v. Kansas City etc. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541. The want of contributory negligence may be declared by the court as a matter of law, when there are no facts in evidence from which an inference of negligence may be drawn; *McDonald v. Long Island R. R. Co.*, 116 N. Y. 546; 15 Am. St. Rep. 437, and note.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. — Unless the evidence of contributory negligence is so plain as to leave no doubt in the mind of a reasonable man it should be left to the jury: *Nesbitt v. Greenville*, 69 Miss. 22; 30 Am. St. Rep. 521, and note with cases collected.

GEMMELL v. DAVIS.

[75 MARYLAND, 546.]

CORPORATIONS — LIEN UPON STOCK. — At common law, no lien exists in favor of a corporation upon the stock of any share-holder to satisfy or secure a debt due by him to the company; and unless such lien is created by statute, by charter, or by usage brought to the knowledge of and acted on by both parties, it does not exist at all. When the corporation has no such lien, it cannot resist or prevent a transfer of the stock by any shareholder to some one else.

CORPORATIONS — RIGHT TO SET OFF DIVIDEND AGAINST DEBT OF STOCK-HOLDER. — A corporation may withhold a dividend and set it off against a debt due by a shareholder to it. In order to do this the dividend must be payable to the person from whom the debt to the corporation is demandable.

CORPORATIONS — RIGHT TO SET OFF DIVIDEND AGAINST DEBT OF SHARE-HOLDER, WHEN EXTINGUISHED. — When corporate stock has passed into the hand of a third person before a dividend has been declared, the right of the corporation to set off such dividend against the debt of the original shareholder is lost, for the reason that dividends declared after such transfer of the stock belong to the assignee and not to the assignor.

CORPORATIONS — TRANSFER OF STOCK. — As between vendor and vendee or pledgor and pledgee of stock, a transfer on the books of the corporation is not essential to perfect an equitable title in the vendee or pledgee.

CORPORATIONS — DIVIDENDS, WHO ENTITLED TO. — As between the vendor and vendee or the pledgor and pledgee of shares of corporate stock, all dividends declared after the sale or pledge of the stock belong to the vendee or pledgee, even though the transfer has not been recorded on the books of the corporation.

CORPORATIONS — DIVIDENDS, PAYMENT OF, TO PLEDGOR. — While dividends declared during the pledge of corporate stock belong to the pledgee although he is not registered as owner on the corporate books, yet if not so registered and the corporation pays the dividend in good faith and without notice of the transfer to the pledgor, the payment is a good one as against the corporation.

CORPORATIONS — LIEN ON STOCK. — A PLEDGEE who fails and neglects to notify the corporation that he holds its stock in pledge, or to take the proper steps to secure title to the stock in his own name, will not be protected against the lien of the corporation upon the stock to secure the payment of an indebtedness contracted to the company by the pledgor in the meantime and subsequently to the pledge of the shares.

CORPORATIONS — PLEDGE OF STOCK BY PRESIDENT. — When the president of a corporation pledges his individual stock therein, while not engaged in its business and not acting in his capacity as president and without making a transfer thereof on the books of the company, his knowledge of the transaction is not binding on the corporation.

CORPORATION, WHEN PARTY TO A SUIT, has, like every other party thereto notice of everything disclosed by the record; hence it has notice of an assignment of its corporate stock disclosed thereby.

CORPORATIONS — PLEDGE OF STOCK — RIGHTS OF PLEDGEE. — When the papers relating to a pledge of corporate stock fail to show the debt for which the stock is pledged, the statement of the specific debt it was pledged to secure contained in a subsequent assignment of the same stock by the pledgor to a third party, is merely *ex parte* and cannot impair the rights of the original pledgee.

William L. Marbury and W. I. Cross, for the appellants.

John Prentiss Poe, attorney-general, and *William Pinkney Whyte*, for the appellees.

McSHERRY, J. When this case was last before us (73 Md. 530), the order ratifying the auditor's report was affirmed in part and reversed in part, and the cause was remanded that a new audit might be stated in conformity to the decision then rendered. By that decision sundry claims against the North Branch Company were held to be just debts due by that company, and were directed to be paid in full out of the fund in court. The balance of the fund was declared to belong to the stockholders of the North Branch Company; and it was ordered and decreed that this balance should, in the new audit, be distributed *pro rata* amongst those stockholders. After the record had been remanded and had reached the lower court, a new audit was stated, wherein all the debts due by the North Branch Company were allowed out of the fund, and the balance distributable to the shareholders was ascertained to be \$20,370.04. William A. Brydon at one time owned 488 shares of the stock; 15 shares were held by other persons, chiefly to qualify them as directors, and Gemmell and Sinclair hold the remaining 497. Attorney-General Poe and Mr. William Walsh, who conducted the litigation for Brydon from the beginning of the protracted controversy now nearly at an end, filed an order entering to their own use one third of the amount to which Brydon's stock was entitled, and Henry G. Davis and Company filed a petition claiming, as assignees of Brydon's stock, the dividend payable thereon. The certificates of stock were produced, and upon the back of each certificate there was written a full assignment, dated November 13, 1888, and duly executed by Brydon. No transfers were ever made on the books of the company. Gemmell and Sinclair, the minority stockholders, filed a petition in the case, alleging that Brydon was insolvent, and claiming that

he was a debtor to the North Branch Company in an amount exceeding twenty thousand dollars. They prayed that this alleged indebtedness might be set off against the dividend distributable to Brydon's stock. The auditor allowed the claim of Messrs. Poe and Walsh, and distributed the balance of the Brydon stock dividend to abide the further order of the court. The circuit court of Baltimore City ratified the audit, and awarded the balance of the fund so audited, to abide its further order, to Henry G. Davis and Company and Mrs. Susan V. Brydon, the wife of William A. Brydon. From this order Gemmell and Sinclair took the pending appeal.

There was some additional evidence taken relative to the ownership of Brydon's stock. It appears from this evidence that Brydon's stock was first pledged by him to Henry G. Davis and Company on August 27, 1874. No assignment was then indorsed on the certificates, but the certificates were placed by Brydon in an envelope, and were delivered to one of the members of the firm of Henry G. Davis and Company, and upon or accompanying the envelope was this memorandum, viz.: "August 27, 1874. Five hundred and three shares stock of the North Branch Company William A. Brydon placed in the hands of W. R. Davis as collateral for certain advances by H. G. Davis & Co. Received August 27, 1874, four hundred dollars. W. A. Brydon." Subsequently the assignment of November 13, 1888, was written on the certificates, which, since their delivery on August 27, 1874, have been continuously in the possession of Henry G. Davis and Company. Brydon testified that the assignment was made for the purpose of pledging the stock as collateral security for the payment of the Gouverneur lien, and for a loan of four hundred dollars; though Henry G. Davis and Company claim that the pledge was intended to secure numerous other items of indebtedness on the part of Brydon to them. It further appears that on the twenty-eighth day of October, 1876, Brydon executed the following transfer of the same stock to his wife, viz.: "For value received, I hereby assign and transfer to Susan V. Brydon four hundred and ninety-two shares of the capital stock of the North Branch Company, being certificates No. . . . said stock being now held by H. G. Davis & Co. as collateral security for the payment of the Gouverneur decree, viz., \$5,932.92 for which they hold my note dated June 11, 1875. Witness my hand and seal this twenty-eighth day of October, 1876." This, he testified, was intended as a col-

lateral security for his indebtedness to her. The *Gouverneur lien* has been paid off and discharged. It was allowed as a valid claim against the North Branch Company on the former appeal in this case; and the four hundred dollars according to Brydon's testimony, have likewise been settled. That Brydon was justly indebted to his wife when he executed this transfer to her does not admit of a doubt. That he was also indebted to Henry G. Davis and Company for large advances made by them to him is equally certain.

As the case now stands, there are three claimants to the fund constituting the dividend on the Brydon stock, namely, the North Branch Company, represented by its minority stockholders: Henry G. Davis and Company, and Mrs. Susan V. Brydon, though there is no contest between the latter two; for, whilst they both claim the fund, they do not claim it as against each other, but as against the North Branch Company. If Davis and Company are entitled to the dividend, or if Mrs. Brydon is entitled to it, the claim of the North Branch Company must fall. If they be not entitled to it, the North Branch Company will be, provided Brydon is actually indebted to it as alleged.

So far as the appellants are concerned, it makes no difference whether the dividend on the Brydon stock rightfully belongs to Davis and Company or to Mrs. Brydon. Unless the North Branch Company — the body corporate, not Gemmell and Sinclair, as individual stockholders — has a lien on the dividend, which lien is prior in its equities to the claims of Davis and Company and Mrs. Brydon, the contention of the appellants cannot be sustained. Naturally, therefore, the first question which presents itself is, assuming that Brydon is indebted to the North Branch Company in an amount twice as large as the dividend, what claim or lien has the company on that dividend? There is no lien reserved in the charter of this company (Act, 1867, c. 309), or even in its by-laws, in favor of the corporation upon the stock of any shareholder to satisfy or secure a debt due by him to the company. No such lien exists at common law: Angell and Ames on Corporations, secs. 355, 569; Cook on Stocks and Stockholders, sec. 521; *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; and unless created by statute, or by the charter, or, perhaps, in some instances, by a usage brought to the knowledge of, and acted on by both parties, it does not exist at all: Morse on Banks and Banking, 505. As the company had, and could

have had by implication or by operation of law, no lien on Brydon's stock to secure the debt due by him to it, it was in no position to resist or prevent a transfer of that stock to some one else; but the right of a corporation to withhold a dividend from a stockholder who is indebted to it, rests upon an entirely different principle. It is the right of set-off; for the dividend is a simple debt owing from the corporation to the shareholder. As in every other case to which this doctrine of set-off is applicable, the debt, that is, the dividend due by the corporation, must be payable by it to the person from whom the obligation to the corporation is demandable. If the stock has passed into the hands of a third party before the dividend has been declared, the right of set-off is gone; because a dividend declared after a transfer of stock has been made belongs to the assignee, and not to the assignor. Had the stock in question been assigned on the company's books, and had new certificates been issued in the name of Davis and Company, or Mrs. Brydon before this dividend was declared, the right of set-off would have been incontestably extinguished. Has it, under the circumstances of this case, been preserved?

As between vendor and vendee, or pledgor and pledgee, of stock, a transfer on the books of the company is not essential to perfect an equitable title in the vendee or pledgee: *Noble v. Turner*, 69 Md. 519; *Baltimore etc. Brick Co. v. Mali*, 65 Md. 96; 57 Am. Rep. 304; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217; *Johnston v. Laflin*, 103 U. S. 800. This principle is fully recognized by the act of 1886, chapter 287, embodied in section 277, article 23 of the code. By the assignment and delivery of certificates the title passed to the pledgee. As between vendor and vendee of shares of stock it is the settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. In other words, dividends belong to the person entitled to the stock when the dividends are declared. *Abercrombie v. Riddle*, 3 Md. Ch. 320. Even though the transfer has not been recorded, the transferee has a right to the dividends, as against the transferer: *Cook on Stocks and Stockholders*, sec. 541. A pledgee is protected in the same way as a purchaser of stock: *Cook on Stocks and Stockholders*, sec. 432; and consequently dividends declared during the continuance of the pledge belong to him, though he is not registered as owner on the corporate books: *Cook on Stocks*

and Stockholders, sec. 468; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed in 71 N. Y. 593. If not so registered, and the corporation pays the dividend in good faith and without notice of the transfer to the nominal owner, the payment would be undoubtedly a good one; but a pledgee who neglects to notify the corporation that he holds the stock in pledge, or to take the proper steps to secure title to the stock in his own name, will not be protected against the lien of the corporation upon the stock to secure the payment of an indebtedness contracted to the company by the pledgor in the meantime, and subsequently to the pledge of the shares: *Cook on Stocks and Stockholders*, sec. 525.

Though Brydon, who was the president of the North Branch Company, knew of the transfer to Davis and Company and to Mrs. Brydon, because he made them, his knowledge thus acquired was not binding on the company, he not then being engaged in the business of the company, and not acting in his capacity of president: *Winchester v. Baltimore etc. R. R. Co.*, 4 Md. 231. Now, though all the certificates of stock held by Brydon were delivered to Davis and Company in 1874 "as collateral for certain advances," they were not assigned until November, 1888. They were then transferred "as collateral per agreement of this date," and a blank power of attorney was signed authorizing a transfer to be made on the books of the company. From that time Davis and Company became the equitable owners of the stock and entitled to any dividends thereafter declared thereon, unless subsequent to that date Brydon contracted a debt to the company whilst the latter was in ignorance of the assignment. If Brydon became indebted to the company after November 13, 1888, without the company having notice or knowledge of the assignment to Davis and Company, the latter would not in equity be allowed to claim the dividend in prejudice of the company's right of set-off, because the enforcement of such a claim under those conditions would work a fraud and an injustice upon the company. It is not pretended that Brydon's alleged indebtedness to the North Branch Company arose after November 13, 1888; indeed it is clear from the records on the former appeals that the last item in the claim against him was not of a later date than 1876. The company possessing, as we have seen, no lien at all upon the stock, and Davis and Company having acquired the equitable title thereto in November, 1888, and there being no indebtedness con-

tracted by Brydon thereafter to the North Branch Company, the dividend when declared in 1891 was due and payable to Davis and Company, who then held the stock. The North Branch Company, Gemmell and Sinclair, and every party in interest being, as we shall show in a moment, fully apprised of the claim of Davis before the dividend was declared, that dividend cannot be retained by the corporation to liquidate Brydon's debt to it. That debt was not contracted on the faith of this dividend. The failure to transfer the stock on the books of the company placed the company in no worse position as to Brydon's antecedent indebtedness to it than if the stock had been regularly and formally assigned on the transfer-books. The omission to notify Gemmell and Sinclair, or the corporation, earlier than they were informed, of the fact that Davis held the shares as collateral, misled no one, and certainly did not induce the corporation to trust or credit Brydon for a single dollar. What equity has the company to withhold the dividend confessedly payable to the pledgee of the shares, and not only to withhold it, but actually to apply it in payment of another person's indebtedness?

Whilst the proceeding is ostensibly in behalf of the North Branch Company, the real object of Gemmell and Sinclair is to have the dividend distributed to themselves. Both they and the North Branch Company are parties to this cause, and have been from the beginning. During the progress of the case and long before the appeal in 73 Maryland was taken, it appeared in the proceedings that Brydon had assigned his stock to Davis and Company for their indemnity, and all the parties to the cause either actually knew or were chargeable with notice of this fact thus disclosed by the record.

Is it at all in consonance with the principles which govern courts of equity that Gemmell and Sinclair should be permitted, in the name of the corporation, to take possession of this fund for themselves when they and every party to the cause knew before the dividend was declared that Davis and Company claimed the shares, and every incident of them, by assignment? Gemmell and Sinclair are seeking to gain an advantage for themselves personally by reason of the failure of Davis to have the assignment regularly entered on the books of the corporation; though had such entry been made, they would have had no superior information on this subject than that which they did possess, when, on September 19, 1891, they filed their petition, claiming the fund for the company.

To decree that dividend to the North Branch Company is simply to decree it to Gemmell and Sinclair in spite of their knowledge that Davis and Company hold a transfer, dated more than two years before the dividend was declared, entitling them to that dividend. Whilst the North Branch Company was not a going concern, it certainly was a party to the proceedings in this cause, and like every other party thereto, had notice of everything disclosed by the record; and one of the things which the record did disclose long before the dividend was declared was the assignment of Brydon's stock to Davis and Company. Had the dividend been declared before the assignment was made, the question would be entirely different. Then the dividend would have been due to Brydon. Now it is not. The pledgee is entitled to demand it. As against him the company has no superior equities.

But it has been insisted that Davis and Company only held the stock as collateral security for the Gouverneur lien and a debt of four hundred dollars. This Brydon has testified to. The written memorandum made when the certificates were delivered to Davis in 1874 does not restrict the security for those two debts, nor does the formal and final assignment made in November, 1888. These papers fail to disclose that the stock was pledged for those particular items of indebtedness, and none other. The probabilities are all against such a contention. Davis and Company had made large advances to Brydon for various purposes before November 13, 1888, and it is highly improbable when they procured the assignment that they took it as collateral for only a portion of the debts due to them by Brydon. There is not sufficient evidence in the record to justify this court in narrowing the broad terms of the written assignment and in confining that assignment to the two claims mentioned by Brydon. The transfer made by Brydon to his wife speaks of the previous assignment to Davis and Company as collateral for the Gouverneur claim, but that is merely Brydon's *ex parte* declaration, and cannot have the effect of impairing the rights of Davis and Company under the comprehensive terms of the transfer made to them.

In this view of the case it becomes unnecessary to inquire as to Mrs. Susan V. Brydon's claim to the dividend, or into the question of Brydon's indebtedness to the North Branch Company. The only appeal before us is that of Gemmell and

Sinclair. As the North Branch Company, which they represent, has shown no reason for a reversal of the order appealed from, that order will be affirmed, without considering whether the claims of Davis and Mrs. Brydon conflict with each other. Order affirmed, with costs.

CORPORATIONS — LIEN UPON STOCK. — In the absence of a contract or provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; *Bank v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; extended note to *Morgan v. Bank*, 11 Am. St. Rep. 581.

CORPORATIONS — UNRECORDED TRANSFER OF STOCK. — An unrecorded transfer of the stock in a corporation is valid only as between the parties: *In re Argus Printing Co.*, 1 N. D. 435; 26 Am. St. Rep. 639; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472, and note; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250; See extended note to *Dickinson v. Central Nat. Bank*, 37 Am. Rep. 353; note to *Weston v. Bear River etc. Min. Co.*, 63 Am. Dec. 120; note to *Bank v. Smalley*, 14 Am. Dec. 530.

CORPORATIONS — DIVIDENDS — TO WHOM BELONG. — See note to *Phinizz v. Murray*, 20 Am. St. Rep. 344, also extended note to *Goodwin v. Hardy*, 99 Am. Dec. 761.

EULER v. SULLIVAN.

[75 MARYLAND, 616.]

NUISANCE — SMOKE AND CINDERS, WHEN CONSTITUTE. — In order to recover damages to property caused by smoke, cinders, and steam arising from the chimney of a boiler erected near the property injured, the injury sustained must be of a character to materially diminish the value of the property or seriously interfere with the ordinary comfort or enjoyment of it. Hence an instruction that the jury must find for plaintiff if the injury complained of rendered the premises less comfortable, enjoyable, or useful than they otherwise would have been, is erroneous, as being misleading and entirely too general.

NUISANCE — SMOKE AND CINDERS. — In determining the question of nuisance from smoke, cinders, or noxious vapor, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. In such cases trifling annoyances and inconveniences, suffered by persons dwelling in cities, will not be regarded as nuisances.

NUISANCE — SEPARATE ACTIONS FOR JOINT NUISANCES. — It is no defense of a nuisance that a great many others are committing similar acts of nuisance upon the same property. Each and every one is liable to a separate action. Each element of contributory injury is a part of one common whole, and to stop the mischief of the whole, each part in detail is subject to a separate action.

NUISANCE — WHAT DOES NOT CONSTITUTE DEFENSE. — No place can be convenient for carrying on a business which is a nuisance, and which causes

substantial injury to the property of another. Nor can any use of one's own land be said to be reasonable, which deprives an adjoining owner of the lawful use and enjoyment of his property, and this without regard to the locality where such business is carried on, and although the business may be lawful, and useful to the public, and the best and most approved appliances and methods are used in its conduct and management.

C. D. McFarland and Peter J. Campbell, for the appellant.

Henry D. Loney and W. H. Cowan, for the appellee.

BRISCOE, J. This is an action for damages brought by the appellee against the appellant for a nuisance. The defendant, at the trial, reserved one exception, and that was to the granting of the plaintiff's prayer, and to the rejection of two prayers offered on his part. The evidence on the part of the plaintiff shows, that she is the owner of a lot of ground fifteen by fifty-eight feet, which is improved by a brick dwelling, fronting on Little Paca Street and running back to Burgundy Alley, in Baltimore City, which is used by her as a store and a dwelling; that the defendant owns the property adjoining thereto, which he uses for the purposes of a paper box factory; that on defendant's premises there is an engine, boiler, and smoke stack, the latter being about a foot and a half from plaintiff's house; that she rented out rooms in her dwelling, and also kept a shop in a part of it; that the articles which she kept in her shop were rendered unsaleable, and the rent of her dwelling was diminished by the smoke, steam, and cinders from defendant's chimney.

And the evidence on the part of the defendant shows that there are other steam engines, boilers and smoke stacks in factories located near this dwelling; that smoke, steam, and cinders were emitted from these factories and mingled with the smoke from the chimney of his factory; that a cold storage factory has two large boilers and engines situated about seventy feet from this dwelling; that the defendant has a small engine and boiler, and kept them in a good condition; that he used his engine in the usual and ordinary way, and did not cause the smoke, steam, and cinders to be emitted in an unreasonable manner from his premises, so as unnecessarily to injure the plaintiff.

Upon this state of facts the court below granted the following instruction on the part of the plaintiff: "If they find from the evidence that the defendant erected a boiler and engine near to the house and lot of the plaintiff, and that smoke,

steam, and cinders escaped from the chimney of the defendant connected with the said boiler; which smoke, steam, and cinders entered the premises of the plaintiff in such quantity or to such extent as to render her house and premises less comfortable, enjoyable, or useful than they otherwise would have been, then the plaintiff is entitled to their verdict." There were two prayers offered by the defendant, which we will consider hereafter. Does, then, the instruction given by the court on the part of the plaintiff correctly define the law, as applicable to this case? In the recent case of the *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 276; 25 Am. St. Rep. 595, this court said that "no principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie" (*vide* cases there cited); but all of the authorities hold that the injury must be of a character to diminish materially the value of the property or seriously interfere with the ordinary comfort and enjoyment of it, such as would entitle the party injured to substantial damages: *Adams v. Michael*, 38 Md. 123; 17 Am. Rep. 516; and in the case of *Dittman v. Repp*, 50 Md. 522; 33 Am. Rep. 325, this court held, that in determining the question of nuisance from smoke or noxious vapor, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance, that he might rightfully claim if he were dwelling in the country. Every one taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent.

Applying, then, these well-settled legal principles to the facts of this case, we are of opinion that there was error in the general legal proposition asserted in the appellee's prayer, that the jury must find for the plaintiff, if the injury complained of rendered her premises less comfortable, enjoyable, or useful than they otherwise would have been. The prayer was entirely too general, and was misleading. As was said in the case of *Dittman v. Repp*, 50 Md. 522; 33 Am. Rep. 325: "The

question is, whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant." The law in these cases does not regard trifling inconveniences and annoyances. We think there was error in the court's granting the plaintiff's prayer, and for this reason the judgment will be reversed and a new trial awarded. We find no error in the court's refusal to grant the defendant's first and second prayers. They both proceed upon the erroneous assumption that the plaintiff could not recover, if the wrong complained of was committed by another jointly with the defendant. The first prayer directs that if the dwelling of the plaintiff is situate in a locality where there are other factories, in addition to the factory of the defendant, which use steam-power, and emit smoke and cinders, which intermingles with the smoke and cinders from the defendant's factory, fills the air of the locality of the dwelling of the plaintiff, and that the plaintiff's dwelling is not injured by vibration or noise caused by the working of the engine or machinery on the premises of the defendant, then the jury must find for the defendant.

And the third prayer directs that if the defendant conducted his paper-box factory in a fair, reasonable way, and erected it in a locality where there are other factories using machinery and steam-power similar to the factory operated by the defendant, then the plaintiff is not entitled to recover damages for any discomfort or annoyance which may arise from the ordinary use and operation of the engine and machinery on the premises of the defendant.

It will at once be seen that the theory of these two prayers is entirely at variance with the law laid down by this court in *Woodyear v. Schaefer*, 57 Md. 9; 40 Am. Rep. 419; and in *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. Rep. 595. In the former of these cases this court said: "It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the same property. Each and every one is liable to a separate action. Each element of contributory injury is a part of one common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed"; and in the latter case,

it is held "that in the eye of the law no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be reasonable which deprives an adjoining owner of the lawful use and enjoyment of his property"; and this, too, without regard to the locality where such business is carried on; and although the business may be lawful and useful to the public, and the best and most approved appliances and methods may be used in its conduct and management.

Judgment reversed, and new trial awarded.

NUISANCES — UNDESIRABLE BUSINESS. — An adjoining land-owner is without remedy for the depressing effect upon the desirability or market value of his land caused by the proximity of an undesirable business; but if such business is conducted so as to injuriously affect the use of the land the owner may recover damages therefor: *Robb v. Carnegie*, 145 Pa. St. 324; 27 Am. St. Rep. 694, and note. The carrying on of a lawful business will be restrained when the prosecution of such business renders the enjoyment of a neighboring dwelling-house materially uncomfortable on account of smoke, cinders or offensive odors: *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654, and note. See extended notes to *Rouse v. Martin*, 51 Am. Rep. 467; *Appeal of Pennsylvania Lead Co.*, 42 Am. Rep. 540.

NUISANCES — INDEPENDENT TRESPASSERS — LIABILITY OF EACH. — Where an injury to land from the accumulation of the refuse from coal works is the result of the independent acts of trespass by two or more persons, each act is a separate cause of action for that portion of the injury done by it: *Gallagher v. Kemmerer*, 144 Pa. St. 509; 27 Am. St. Rep. 673, and note.

NUISANCES — DEFENSES TO. — At no place can a nuisance be maintained on the ground that it is convenient for the carrying on of the business, if such business causes substantial injury to the property of another: *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595, and note; *Hurlbut v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17; *Laflin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34. See extended note to *Appeal of Pennsylvania Lead Co.*, 42 Am. Rep. 540.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

THYNG v. FITCHBURG RAILROAD COMPANY.

[156 MASSACHUSETTS, 13.]

NEGLIGENCE, CONTRIBUTORY, PRESUMPTION OF. — If the evidence shows that an employee of a railway corporation was at the time of receiving injuries engaged in the performance of his duty, and there was nothing to show that he was careless, he is not required to prove that he did any particular act by way of precaution, or was not guilty of contributory negligence.

A RAILWAY CORPORATION USING CARS OF ANOTHER is not answerable for any defect in their original construction, if it made proper provision for inspecting them and for the safety of its employees while using them.

RAILWAYS — NEGLIGENCE OF ONE EMPLOYEE RESULTING IN INJURY TO ANOTHER. — A railway corporation is not answerable to one of its employees for injuries resulting from the use of a defective coupling-pin, if it supplied proper pins, and the failure to use them or to replace one too short by a long one, was the fault of one of its servants who used them, and not of the corporation.

RAILWAY CORPORATION — STATUTORY LIABILITY FOR ACCIDENTS. — A statute imposing liability for accidents happening "by reason of the negligence of any person in the service of an employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad," does not render a railway corporation liable for injuries resulting from negligence of the conductor of a switch engine while making up a train, consisting of his failure to see that a proper coupling-pin was used. The statute refers only to persons whose duties relate to the charge of a locomotive engine or the train when complete.

NEGLIGENCE, PRESUMPTION OF, FROM AN ACCIDENT. — **THE FACT THAT A FREIGHT TRAIN BROKE APART** when it ought not to have done so is not of itself evidence of negligence on the part of the railway corporation for which it is answerable to one of its servants, though the rule is otherwise when the person injured is not an employee.

ACTION by the administratrix of Frederick Thying to recover for injuries received by him when in defendant's service, re-

sulting in his death. While he was performing his duties as a brakeman on one of defendant's freight trains, two cars, neither of which belonged to defendant, broke apart, and he fell from one of them and was so injured that his death resulted. The evidence, so far as material to the points considered by the court, is stated in its opinion.

H. W. Bragg and R. Bradford, for the plaintiff.

G. A. Torrey, for the defendant.

KNOWLTON, J. There was evidence from which the jury might have found that the plaintiff's intestate was in the exercise of due care. He was engaged in the performance of his duty, and there was nothing to show that he was careless, and the case is not one which makes it incumbent on the plaintiff to prove that he did a particular act by way of precaution: *Maguire v. Fitchburg R. R. Co.*, 146 Mass. 379.

The accident happened by reason of the breaking apart of a freight train. The two cars between which the coupling gave way were foreign cars, and did not belong to the defendant. If there was a defect in the original construction of either of them, the defendant was not liable for it, if proper provision was made for the inspection of them, and for the safety of the defendant's employees while using them: *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456. One of the cars had a double-mouthed drawbar, that is, a drawbar fitted with two openings, one above the other, to receive the link from the drawbar of the next car, with a view to the better adjustment to each other of cars of different heights. There was evidence that a double-mouthed drawbar requires a longer pin than an ordinary single-mouthed drawbar, and that the accident may have happened in this case because the pin used in the double-mouthed drawbar did not extend down far enough to keep its place at the bottom of the bar. The jury might have found that there was negligence in the use of too short a pin in making up the train; and it is contended that they might have held the defendant responsible for that negligence.

If there was a negligent failure to provide a proper pin for the drawbar when the car was built, or at any time before it came into the charge of the defendant, it was the fault of the corporation which owned the car, and not of the defendant. The manner of using cars received from other corporations, as well as its own, might be left by the defendant to competent servants. If supplies were needed to enable its servants safely

to use the cars the defendant was bound to furnish them. Nothing was needed in the present case but a longer coupling-pin. There was no evidence that there was any failure on the part of the defendant to supply such pins for the use of its servants in making up trains. On the contrary the evidence was undisputed that pins of different lengths were supplied. The witness Dean testified: "We have an extra supply of pins on the train, kept in the caboose and on the engine. When making up trains in the yard there are always pins and links lying around. If I was making up a train myself, and saw that there was an imperfect pin in a certain place, I would get another and put in the place of it. That has always been the rule. . . . You can find almost any kind of a pin or link any time in the yard." Campbell said: "We have pins of all the different lengths known, on the train, or lying about where we could get them." Wakefield testified that after the accident he got a new pin from the caboose, which came four or five inches below the bottom of the drawbar, and in this he was corroborated by Dean. Upon the undisputed evidence, the men who made up the train could easily have got a longer pin in the yard, or from the caboose which was going with the train. When proper pins for the coupling of cars were supplied, the failure to use them properly, or to replace one too short by a longer one, was the fault of the defendant's servants who used them, and not of the defendant.

The plaintiff seeks to charge the defendant under that clause of the statute (Stats. 1887, c. 270, sec. 1, cl. 3) which relates to accidents that happen "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." It is not contended that it was the duty of the conductor of the train which broke apart to inspect the couplings between the cars after the train started, and the proof was that his duties in reference to the train began when it was ready to start. The only person to whom the plaintiff's contention relates is the conductor of the switch engine, who has charge of making up freight trains in the yard. Is his negligence in making up a train negligence of a person in charge or control of a locomotive engine, or train, within the meaning of this statute? The liability exists only when the negligence is in the management of the matters which are mentioned as in the employee's charge or control. The fact that he is a person who is accustomed to have such charge and control

does not enlarge the liability of his employer so as to include responsibility for the results of his negligence in respect to other things. A conductor of a switch engine which is drawing several cars under his direction may be, for the time, in charge of a train consisting of the engine and cars: *Dacey v. Old Colony R. R. Co.*, 153 Mass. 112; but there is nothing to show that this conductor of a switch engine was at any time negligent in his charge or management of such a train, or of the engine attached to it, or that his conduct in reference to such a train had any connection with the accident. His only relation to the train on which the plaintiff worked was to bring the cars together and make the train up. His duties were ended as soon as the cars were connected so as to make a train. He never had charge or control of those cars as a train, but he was to determine what cars should be brought together to constitute the train, and see that they were properly coupled and ready to be taken away. The statute, in referring to a "signal, switch, locomotive engine or train," seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. The charge or control is of that whose characteristic is rapid and forceful motion. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine. The statute might have been made to include those who have charge of the construction of the engine or the cars or who inspect them. Neglect of their duties would be likely to cause an accident to the train while in motion; but the legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine or the train when complete. The conductor of the switching engine was at no time in charge or control of the train on which the plaintiff worked. Looking at all the particulars of the defendant's conduct, we can see no evidence on which the corporation can be charged in a suit brought by one of its servants.

The principle by which *Griffin v. Boston etc. R. R. Co.*, 148 Mass. 143, 12 Am. St. Rep. 526, was governed should not be applied to a case like the present. The fact that a freight train broke apart when it ought not to is some evidence of negligence, for which the railroad would be liable in a suit brought by one who is not an employee; but if nothing more appears, it does not indicate negligence of the corporation for

which it is liable to one of its servants, as distinguished from negligence of a servant for which it is not liable to another servant. In a case like the present, where the only culpable cause to which the accident can be ascribed is the use of too short a coupling-pin on a car of another corporation, it points to negligence of a fellow-servant quite as much as to the negligence of the corporation itself.

The persons who made up the train were fellow-servants of the plaintiff's intestate, and the ruling at the trial was correct.

Exceptions overruled.

CONTRIBUTORY NEGLIGENCE is not presumed, but must be proved, and the burden of proving it rests on the defendant: *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Little Rock etc. R'y Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245; unless the plaintiff's testimony inculcates himself: *Missouri Pac. R'y Co. v. Foreman*, 73 Tex. 311; 15 Am. St. Rep. 785; *North Birmingham etc. R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105.

RAILROAD COMPANIES. — The inspection of foreign cars is as much a duty resting on the company as the inspection of its own cars: *Gutridge v. Missouri Pac. R'y Co.*, 94 Mo. 468; S. C., 105 Mo. 520; 4 Am. St. Rep. 392; *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398; 15 Am. St. Rep. 410. Its duty as regards its own cars is to use ordinary care to keep them in good repair: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; *Burlington etc. R'y v. Liehe*, 17 Col. 280. The defendant is liable for an injury caused by a want of a proper inspection of its cars: *Cowan v. Chicago etc. R'y Co.*, 80 Wis. 284; but where there has been a thorough inspection a short time before the accident, and none of the train hands afterwards saw the defect prior to the accident, the company is not liable: *Mensch v. Pennsylvania R. R. Co.*, 150 Pa. St. 598; nor is the company charged with the duty of inspecting the machinery used by it to discover latent defects: *Missouri Pac. R'y Co. v. Crenshaw*, 71 Tex. 340.

PRESUMPTION OF NEGLIGENCE FROM THE HAPPENING OF AN ACCIDENT: See notes to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495, and *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736-738.

BROWN v. BRADLEE.

[156 MASSACHUSETTS, 28.]

PUBLIC OFFICERS, WHEN PERSONALLY LIABLE. — An offer or promise to the effect that a sum specified will be paid to any person furnishing evidence which will lead to the arrest and conviction of the person who shot E. C. and signed J. W. B., T. E. R., J. A. S., "Selectmen of Milton," is a personal promise of the persons so signing it, especially if they did not, in their official capacity, have authority to bind the town of which they were selectmen.

REWARDS — EVIDENCE TO PROVE THAT THE GUILTY PARTY HAD BEEN BROUGHT TO JUSTICE. — The record of the conviction of a person for the shooting of another and his admission of his guilt, are admissible in evidence against persons who offered a reward for the arrest and conviction of the person guilty of such shooting, for the purpose of proving that the person so convicted was guilty, and that the reward had been earned by the persons who caused his arrest and conviction.

REWARDS, WHO ENTITLED TO. — If a reward is offered to any person furnishing evidence which will lead to the arrest and conviction of the person who committed a specified crime, it is not necessary that the person claiming such reward should be the first or only person giving information, if he was the person giving the first effective information which led to the arrest and conviction.

ACTION to recover a reward. The offer of the reward and the form in which it was expressed are shown in the opinion. One of the grounds of defense was that the plaintiff was not the person furnishing the evidence which led to the arrest and conviction of the guilty person. In support of this defense it was proved that the plaintiff, after the shooting, was told by a nephew of the person shot that on the day of the shooting two suspicious appearing men rode into Boston on a particular horse-car, on which one Conlan was conductor. The same information had previously been given to the police. The plaintiff, by acting upon it and discovering that one De Lucca was probably one of such men, procured his arrest by the police, and such arrest led to further evidence from which a conviction followed. The only evidence of the guilt of De Lucca was the record of his conviction and the notes of the trial, from which it appeared that he confessed that he did the shooting. The defense requested the court to rule, 1. "That there was no evidence to support a finding that evidence leading to the arrest and conviction had been furnished by the plaintiff; 2. That such evidence, if any, furnished by the plaintiff, was furnished jointly by the plaintiff and Caleb Cunningham; 3. That upon the terms of the contract in the suit, and upon the evidence, there was no evidence of liability of these defendants;

4. That there was no evidence in the case to warrant a finding that De Lucca was the person who shot Edward Cunningham." The court, while refusing this request, informed the jury that the plaintiff could not recover unless he furnished the first information leading to the arrest and conviction of the guilty party; "and that, in considering whether the evidence furnished by the plaintiff led to the arrest and conviction, and was the efficient cause of producing it, the jury should inquire whether any information had been previously given which led to it, as, for example, by Mr. Caleb Cunningham. Was the information that Mr. Cunningham furnished the first effective information which led to the arrest and conviction? If so, the plaintiff could not recover"; and also that the plaintiff must himself, and not jointly with someone else, have furnished the evidence. The court at the request of defendants' counsel, instructed the jury that "upon the contract in the declaration, the reward is to be given to the person who first gives the evidence or information which led to the arrest and conviction; and the mere furnishing of additional evidence or information by another will not entitle the other to the reward"; but added: "That is so, but you are to distinguish between a case where the information first given was the information which led to the arrest, in which case this principle would apply, and a case where the first information or evidence furnished was not the first effective information which led to the arrest, but was something insufficient for that purpose, and the first effective information or evidence leading to the arrest was given subsequently to certain information which was not the first effective information leading to the arrest." Verdict for plaintiff.

J. M. B. Churchill, for the defendants.

C. Browne, J. J. Feely, and J. H. Taylor, for the plaintiff.

HOLMES, J. This is an action to recover a reward which was offered in writing in the following terms:—

"Two thousand five hundred dollars reward will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham, November 21, 1889.

"J. WALTER BRADLEE,

T. EDWIN RUGGLES,

J. ALBERT SIMPSON,

Selectmen of Milton.

"Milton, Nov. 22, 1889."

The main questions reserved by the report are really questions as to the construction of this instrument, namely, whether the defendants bound themselves personally by it, and what evidence would warrant a finding that the conditions of the offer were satisfied.

On the first question we are of opinion that the defendants are personally liable. No doubt the instrument would bind the town if made with authority and intent to bind it: *Crawshaw v. Roxbury*, 7 Gray, 374; *Janvrin v. Exeter*, 48 N. H. 83; 2 Am. Rep. 185; but the same words may bind two parties—the agent, because in their literal sense they purport to bind him; the principal, because he is taken to have adopted the name of the agent as his own for the purpose of the contract: *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314; *Calder v. Dobell*, L. R. 6 C. P. D. 486. The purport of the words used in this case is that the promise contained in the body of the paper is made by the signer. The only question is, Who is the signer? Do the defendants, by adding their official designation, take away from their names their ordinary significance as proper names, and make of their collective signatures a composite unit, which means the town of Milton and nothing else? We think not. But for the words, “Selectmen of Milton,” the promise would be in the usual and proper form for a personal undertaking: *Wentworth v. Day*, 3 Met. 352; 37 Am. Dec. 145; *Besse v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747; *Lancaster v. Walsh*, 4 Mees. & W. 16; *Lockhart v. Barnard*, 14 Mees. & W. 674; *Thatcher v. England*, 3 Com. B. 254; *Tarner v. Walker*, L. R. 1 Q. B. 641; L. R. 2 Q. B. 301. If it contained express words of personal promise, and the corporation was a private corporation, or the agents were not public officers, the mere addition of their office would not exonerate them: *Simonds v. Heard*, 23 Pick. 120, 125; 34 Am. Dec. 41; *Fullam v. West Brookfield*, 9 Allen 1, 4; *Tucker Mfg Co. v. Fairbanks*, 93 Mass. 101, 104. The only argument which can be relied on for a different conclusion here is that the defendants were public officers, and that a more liberal rule prevails with regard to them. It has been doubted how far there is such a difference with regard to agents or officers of a town: *Simonds v. Heard*, 23 Pick. 120, 124; 34 Am. Dec. 41; *Hall v. Cockrell*, 28 Ala. 507; *Providence v. Miller*, 11 R. I. 272; 23 Am. Rep. 453; and these cases show very plainly, if authority for the proposition is needed, that such officers will bind themselves personally if they purport to do

so. As a test of what the defendants have purported to do by the literal meaning of their words, suppose that their offer had been under seal, we think it would have been impossible to say that the only meaning of the signature was the town of Milton: See *Coddling v. Mansfield*, 7 Gray, 272, 273. Perhaps our conclusion is a little strengthened by the consideration that, so far as appears, the defendants had not authority to bind the town for more than five hundred dollars: Pub. Stats., c. 212, sec. 12; for although, of course, an agent does not make a promise his own by exceeding his authority if it purports to bind his principal only: *Jefts v. York*, 4 Cush. 371; 50 Am. Dec. 791; still, when the construction is doubtful, the fact that he has no authority to bind the supposed principal is a reason for reading his words as directed toward himself: *Hall v. Cockrell*, 28 Ala. 507, 512.

The second question was raised by a request for a ruling that there was no evidence of the defendant's liability. It was proved by the record that one De Lucca had been convicted for the shooting of Edward Cunningham, and De Lucca's evidence at his trial, admitting that he shot Cunningham, was also put in, but the defendants contended that this evidence was *res inter alios*, and not competent in this action to prove that De Lucca was the guilty man. This position rests on too strict a construction of the words, "the person who shot Mr. Edward Cunningham," in the contract. We will assume that they mean a little more than "a person for shooting," and that it would be open to the defendants to prove mistake or fraud in the conviction; but we have no doubt that the contract so far adopts the proceedings of the criminal trial as a test of liability that the conviction is *prima facie* evidence of guilt, and that the admission of the party accused there is admissible when necessary: *Mead v. Boston*, 3 Cush. 404; *York v. Forscht*, 23 Pa. St. 391.

A third question is raised whether the jury were warranted in finding that the plaintiff furnished evidence that led to the arrest and conviction of De Lucca. We are of opinion that there was evidence which warranted their so finding. It is true that the plaintiff was told, as the police had been, that on the afternoon of the shooting two suspicious looking men went into Boston upon a horse-car which left Milton at a certain time, and the conductor of which was named Conlan; but the plaintiff, starting from this hint, by more or less artful inquiries, discovered that De Lucca was probably one of

the men, procured the police to arrest him, and discovered or contributed to the discovery of other evidence which led to the conviction. The question properly was left to the jury, and the instructions given them were full and accurate.

Judgment on the verdict.

PUBLIC AGENTS ACTING IN A PUBLIC CAPACITY ARE NOT PERSONALLY LIABLE on a contract made on behalf of the public: *Simonds v. Heard*, 23 Pick. 120; 34 Am. Dec. 41; *Brown v. Austin*, 1 Mass. 208; 2 Am. Dec. 11; *Walker v. Swartwout*, 12 Johns. 444; 7 Am. Dec. 334; *McCurdy v. Rogers*, 21 Wis. 197; 91 Am. Dec. 468; unless an intent to bind themselves is clearly apparent: *Miller v. Ford*, 4 Rich. 376; 55 Am. Dec. 687; *Sanborn v. Neal*, 4 Minn. 126; 77 Am. Dec. 502. It seems that this general rule does not apply to officers of a municipal corporation which can contract for itself and be sued on its contracts: *Providence v. Miller*, 11 R. I. 272; 23 Am. Rep. 453; but where the committee of a city, describing themselves as such, made a contract for the survey of a city, and affixed thereto their individual signatures and seals and the corporation had recognized their authority, the committee was held not personally liable: *Randall v. Van Vechten*, 19 Johns. 60; 10 Am. Dec. 193; compare *Underhill v. Gibson*, 2 N. H. 352; 9 Am. Dec. 82. So also an action on a promise of an army officer in his official capacity to pay a reward for apprehending a deserter cannot be maintained: *Belknap v. Reinhardt*, 2 Wend. 375; 20 Am. Dec. 621. On the other hand, public agents are said to be personally liable when they make a contract beyond their authority, and also when they use apt words to bind themselves: *McCinticks v. Bryant*, 1 Mo. 598; 14 Am. Dec. 310. The latter principle seems to be the basis of the decision in *Murray v. Kennedy*, 15 La. Ann. 385, 77 Am. Dec. 189, where it was held that a United States marshal who offered a reward for the arrest of a fugitive from justice, and signed the instrument, "U. S. Marshal," acted as a principal and was liable.

REWARDS, WHO ENTITLED TO: See note to *Hayden v. Souger*, 26 Am. Rep. 5-10, especially p. 8, where several cases are cited to the point that the first person giving the information is entitled to the reward.

HUDSON REAL ESTATE CO. v. TOWER.

[156 MASSACHUSETTS, 82.]

CORPORATIONS. — SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION IS NOT A CONTRACT for the want of a contracting party on the other side, but may become such on the organization of the contemplated corporation. At any time prior to such organization such subscription is a mere offer, and may be withdrawn by the signer.

ACTION to enforce a subscription by the defendants to stock of the plaintiff corporation. The defense was that the subscription was made on the condition that the property of the corporation should not be mortgaged; that the subscribers first voted not to make any mortgage, but afterwards re-

scinded that vote, and thereupon, and before the organization of the corporation and before the other subscribers had done anything in consequence of their subscriptions, the defendants notified them that the subscriptions would not be paid. The trial court decided that this defense was insufficient, and directed a verdict for the plaintiff.

J. W. Corcoran, for the defendants.

J. T. Joslin, for the plaintiff.

ALLEN, J. At the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; but it has now been established that a subscription of this sort becomes a contract with the corporation when the corporation has been organized, and in this way the objection of the want of a proper contracting party is finally avoided, provided everything goes on as contemplated without any interruption. Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not on the ground that there was no sufficient consideration; the seal would do away with any doubt on that score; but it is on the ground that for the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence; and for this reason, there being no contract, the whole undertaking is inchoate and incomplete, and since there is no contract the party may withdraw: *Phillips Limerick Academy v. Davis*, 11 Mass. 113; 6 Am. Dec. 162; *Thompson v. Page*, 1 Met. 565; *Ives v. Sterling*, 6 Met. 310; *Perkins v. Union Button-hole etc. Co.*, 12 Allen, 273; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708.

In the present case there was evidence which would warrant a finding that the defendant thus withdrew before the time came when his subscription would have become a contract.

Exceptions sustained. —

CORPORATIONS — SUBSCRIPTIONS PRIOR TO ORGANIZATION. — A subscription by a number of persons to the stock of a corporation to be thereafter formed by them is in the nature of a continuing offer to the proposed corpo-

ration, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation: *Minneapolis etc. Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep., 701; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654. Similarly a subscription in aid of a corporation not yet formed inures to the benefit of the corporation thereafter created: *Griswold v. Trustees*, 26 Ill. 41; 79 Am. Dec. 361. A corporation may sustain an action for subscriptions made to its stock before it was formed, though it is not named as a promisee in the agreement to subscribe: *Marysville Electric Light etc. Co. v. Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215. In *Muncy Traction Engine Co. v. De La Green*, 143 Pa. St. 269, it was held that a subscriber to the capital stock of a manufacturing company, proposed to be incorporated under the statute, might withdraw his subscription at any time before the association was ready to file its articles with the secretary of the commonwealth, and this even though he might have induced others to subscribe to the stock with him.

DURKIN v. COBLEIGH.

[156 MASSACHUSETTS, 108.]

STREETS, ESTOPPEL TO DENY EXISTENCE OF. — A CONVEYANCE OF LAND DESIGNATED AS BOUNDED ON A STREET, the plan of which is referred to, gives the grantee a right by way of estoppel over the entire length of the land designated as a street if it belongs to the grantor, but does not obligate him to build and maintain a street fit for travel.

WRITTEN CONTRACTS AND COLLATERAL AGREEMENTS. — A parol agreement which is collateral to but not inconsistent with a written agreement on a distinct subject-matter, may be proved. Therefore, when a conveyance has been made of land, describing it as bounded upon a public street, the grantee may recover damages for the non-performance of a parol agreement to the effect that, if he would buy such land, the grantor would grade and build the street so as to connect it with a certain public street, and would cause public water to be put in the street.

VENDOR AND VENDEE — FALSE REPRESENTATIONS. — AN ACTION FOR DECEIT may be maintained for falsely representing that a street upon which a lot was situated and which was a part of the grantor's land actually extended from a public street, and that the grantor had the right to open the street so as to make it continuous and to connect with such public street, and by means of such representation inducing plaintiff to purchase such lot, if the non-existence of the right of way to a public street was not open to be ascertained by ocular inspection of the premises. It is not material that the right of way was not mentioned in the conveyance of the land if such conveyance purported to convey the lot with all privileges and appurtenances thereto belonging.

Two actions arising out of the sale and conveyance by defendant to plaintiff of a certain lot, and the representations made to induce its purchase. The first action was to recover damages for the failure of the defendant to grade and build a street and to cause city water to be put therein, and the sec-

ond action was to recover damages for deceit in representing that the defendant had a right of way out of a certain private unbuilt street into a designated public street, over which right of way ingress and egress could be had to and from the lot purchased by plaintiff from defendant, such purchase being induced by such representations. In both actions the trial judge directed verdicts to be entered against plaintiff, and he thereupon appealed.

F. W. Kittredge and W. H. Drury, for the plaintiff.

F. Hutchinson, for the defendant.

ALLEN, J. This is an action of contract. The plaintiff had taken from the defendant a deed of land described as bounded on a street, and referring to a plan on which the street was shown. This street was upon land owned by the defendant. The deed contained no covenant that the defendant would build the street, or cause water to be introduced therein. The plaintiff's case rests upon the proposition that, in order to induce him to buy the lot, the defendant orally promised to grade and build the street so as to connect with a certain public street already built and open, and also to cause the city water to be put into the street by a certain specified time. The question is, whether such an oral agreement may be shown.

The plaintiff gained a right of way by estoppel over the land owned by the defendant and described as a street: *Howe v. Alger*, 4 Allen, 206; *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Crowell v. Beverly*, 134 Mass. 98; and this right would extend for the entire length of the street, as indicated, provided the defendant owned the same: *Tobey v. Taunton*, 119 Mass. 404; *Fox v. Union Sugar Refinery*, 109 Mass. 292; but the defendant would not be bound by his deed to build and maintain the street fit for travel: *Hennessey v. Old Colony etc. R. R. Co.*, 101 Mass. 540; 100 Am. Dec. 127. The obligation of the defendant to do the acts now in question depends wholly on his alleged oral agreement.

A rule has been established which may be stated in general terms to be, that an agreement by parol which is collateral to the written contract and on a distinct subject may be proved. It is rather difficult to lay down a precise formula to define in advance for all cases what will come within this rule. In *Stephens on Evidence*, Am. ed., 163, this is attempted, as follows: "The existence of any separate oral agreement as to

any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them," may be proved. Where the oral agreement is on the face of it inconsistent with what was written, it is plain that the writing must prevail: *Flynn v. Bourneuf*, 143 Mass. 277; 58 Am. Rep. 135; and *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282, were cases of this kind; but the more difficult question arises where the oral agreement relied on relates to something not specified in terms in the writing. It must then be determined whether the written document is to be deemed to contain all that was agreed between the parties. There are many cases in which this question has been presented, and the decisions are not entirely harmonious. Thus in *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380, the court disapproved of the decisions in *Morgan v. Griffith*, L. R. 6 Ex. 70, and *Erskine v. Adeane*, L. R. 8 Ch. 756, in which cases it was held that an oral agreement by a lessor to destroy the rabbits might be proved. In an early Massachusetts case it was held that a lessor is not bound by an oral agreement to provide other and better accommodations than those stipulated for in the lease: *Brigham v. Rogers*, 17 Mass. 571; and on a written contract of sale of goods an additional warranty cannot be proved by parol: *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58; *Eighmie v. Taylor*, 98 N. Y. 288; so, where one by a written instrument agreed to sell out his business stand and stock of goods, it cannot be shown by parol that he also agreed not to engage in a similar business in the same town: *Doyle v. Dixon*, 12 Allen, 576; *Wilson v. Sherburne*, 6 Cush. 68.

On the other hand, in several cases more nearly resembling the present in their facts, it has been held that an additional oral agreement might be proved. Thus oral agreements by vendors of land requiring to be filled, that they would pay for the filling, have been held to be independent collateral agreements which might be enforced: *Page v. Monks*, 5 Gray, 492; *McCormick v. Cheevers*, 124 Mass. 262; also an oral agreement by a grantor to pay for building a sewer in the street: *Carr v. Dooley*, 119 Mass. 294. The case of *Graffam v. Pierce*, 143 Mass. 386, was deemed to come within the same doctrine. It was determined in *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, that a manufacturer of goods who accepted a

written order with stipulations as to quality, price, and rebate or claims for allowance, might be held on an oral agreement to advertise the goods. See also *Willis v. Hulbert*, 117 Mass. 151; *Rennell v. Kimball*, 5 Allen, 356; Taylor on Evidence, secs. 1135, 1147.

It seems to us that the case falls within the last class of decisions, and that the alleged agreement of the defendant should be treated as an independent collateral agreement which need not be included in the deed. The result is, that the plaintiff was entitled to have his case submitted to the jury.

Exceptions sustained.

In the second action the opinion of the court was as follows:—

ALLEN, J. This is an action of tort for deceit in inducing the plaintiff to purchase from the defendant the lot of land referred to in the preceding case. The false representation set forth in the declaration was, in substance, that the street upon which the lot was situated, and which was a part of the defendant's land, actually extended from a public street called South Street to a public street called Dudley Avenue; and that the defendant had a right to open said street upon which the lot was situated, so as to make it continuous, and to connect with a public street at each end. The plaintiff alleged that in fact there was an intervening strip of land which at one end of the private street cut off access to the public street. There was evidence tending to support the averments, and to show that the defendant knew that he had no right over the intervening strip; but it was ruled that the action could not be maintained.

The defendant's right of way, if he had it, would be appurtenant to his land, and so when his land was divided up into building lots would be appurtenant to the lot bought by the plaintiff: *Whitney v. Lee*, 1 Allen, 198; 79 Am. Dec. 727; *Miller v. Washburn*, 117 Mass. 371; and we think that if he falsely and fraudulently represented to the grantee that a right of way was appurtenant to the estate granted, such misrepresentation might be actionable. Whether a right of way existed or not was a thing not open to be ascertained by an ocular inspection of the premises. Nevertheless, the representation related to an actual state of things or fact, the existence or non-existence of which might naturally affect the value of

the land sold: *Dawe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404. The possible importance of the supposed right of way is obvious. In a case which arose in England: *Denne v. Light*, 8 De Gex M. & G. 774, it was held that where an important supposed means of access to premises bargained for was wanting, so that it was uncertain whether the purchaser could reach the estate at all times of the year, specific performance would not be decreed against him, even though there was no fraud; and in *Brewer v. Brown*, 28 Ch. Div. 309, the particulars of sale of a freehold property described the garden as inclosed by a rustic wall with a tradesmen's side entrance, but it appeared that the wall did not form part of the property, and the tradesmen's side entrance was used on sufferance; and it was held that one who had contracted to purchase the property was entitled to have his contract rescinded.

With still stronger reason, if there has been a fraud in representing that an important right of way existed, when it did not exist, the purchaser should be entitled to a remedy. The plaintiff, having built a house upon his lot, cannot well rescind the contract, but seeks compensation in damages for the alleged deceit. It was not necessary that the right of way should be expressly mentioned in the deed. The lot was conveyed "with all the privileges and appurtenances thereto belonging," and a way appurtenant would pass though not mentioned. It was a matter outside, not open to easy verification, and relating to a particular in respect to which the plaintiff had not equal means of knowing the truth: *Medbury v. Watson*, 6 Met. 246, 260; 39 Am. Dec. 726. We think the plaintiff was entitled to go to the jury. The case bears considerable resemblance to *Monell v. Colden*, 13 Johns. 395; 7 Am. Dec. 390, cited by the plaintiff. See also *Ward v. Wieman*, 17 Wend. 193; *Savage v. Stevens*, 126 Mass. 207; 1 Story's Eq. Jur. 205, 225; *Hough v. Richardson*, 3 Story, 659, 690; *Doggett v. Emerson*, 3 Story, 700, 732; *Attwood v. Small*, 6 Clark & F. 232, 395, 444, 447.

The question of the measure of damages is not before us. It is obvious that a recovery in the action of contract might include elements of damage which otherwise might be included in the present action; but there might be damages recoverable in this action which would not be recoverable in that. At present, we have nothing to do with any question of damages.

Exceptions sustained.

STREETS. — **THE CONVEYANCE OF A CITY LOT AS BOUNDED BY A STREET** marked on a plan entitles the grantee to a right of way over such street, if the grantor owned it and a subsequent conveyance of a portion of such street will be void: *Moose v. Carson*, 104 N. C. 431; 17 Am. St. Rep. 681; *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622. Nor can any use be made of the soil of the highway which will defeat the enjoyment thereof by the grantee or his successors in interest: *Lankin v. Terwilliger*, 22 Or. 97. As between grantor and grantee a street is created where land clearly defined as to extent and location is devoted to that end by the grant, although it is not then in condition to be used as a street: *Matter of Ladue*, 118 N. Y. 213.

EVIDENCE SHOWING A PAROL AGREEMENT may be received, although the parties made a written contract at the same time touching the same subject, if it does not contradict or vary the writing: *Hersom v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185; *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889; *Snow v. Alley*, 151 Mass. 14; *Guidery v. Green*, 95 Cal. 630; *Stahelin v. Sowle*, 87 Mich. 124. This rule is frequently applied, where the oral agreement was the consideration for or inducement to the written contract: *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600; *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; *De Camp v. Scofield*, 75 Mich. 449; *Wanner v. Landis*, 137 Pa. St. 61; *Sidney etc. Furniture Co. v. Warsaw School District*, 130 Pa. St. 76. Such oral stipulations must be established by clear, precise, and indubitable evidence: *Ferguson v. Rafferty*, 128 Pa. St. 337. So also parol evidence is admissible to show that an agreement was delivered to the contractee to take effect only upon the happening of a condition which is shown never to have happened: *Humphreys v. Richmond etc. R'y*, 88 Va. 431.

VENDOR AND PURCHASER. — **ACTION FOR DECEIT** may be maintained by the purchaser, where the vendor makes misrepresentations as to a material fact, knowing at the time that they were false, and the purchaser relies on those misrepresentations: *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *McIntyre v. Buell*, 132 N. Y. 192. Representations of the vendor as to extrinsic facts affecting the quality or value of the thing sold which are peculiarly within his knowledge may be relied on by the purchaser, and if the representations are false, and the purchaser is misled thereby to his injury, he may maintain an action for damages: *Schumaker v. Muther*, 133 N. Y. 590. Thus, where a land-owner sold land according to a map which represented streets on his own property opening out upon a street which commissioners in partition had laid out on the edge of the adjoining tract, and gave no information that this street was not on his own land, it was held that when the commissioners' plat was set aside and the street vacated, he was liable in damages for the resulting diminution in the value of the land: *McCall v. Davis*, 56 Pa. St. 431; 94 Am. Dec. 92.

BUSH v. BOUTELLE.

[156 MASSACHUSETTS, 167.]

INSOLVENT LAWS — CONVEYANCES IN CONTRAVENTION OF. — One who advances money to an insolvent under an agreement that he shall receive as security therefor a conveyance of certain property, but to whom such conveyance is not executed until two weeks after such money is received, is not on that account to be ranked as an unsecured creditor receiving security for an unsecured debt, although he had reason to believe that his debtor was solvent when the loan was made.

INSOLVENCY LAWS — ANTECEDENT DEBTS. — ONE WHO LOANS MONEY, KNOWING IT IS TO BE USED IN PAYING A PRE-EXISTING DEBT, to a borrower in embarrassed circumstances, and who takes security for such loan, is not thereby guilty of any fraud or evasion of the insolvency law, and such security cannot be set aside or regarded as a fraud upon such law.

SUIT in equity by the assignee in insolvency of Cyrus F. Boutelle to compel the conveyance of certain lands conveyed by the insolvent to the defendant. Henry P. Boutelle. The cause was submitted for decision upon an agreed statement of the facts, the substance of which was, that on April 10, 1889, Cyrus, knowing himself to be insolvent, borrowed of the defendant one thousand dollars, the payment of which he then agreed should be secured by a conveyance of certain property; that the conveyance was not in fact executed until the twenty-third day of the same month; that defendant had reason to believe that Cyrus was insolvent, and knew that the money was borrowed to pay a pre-existing indebtedness, and that Cyrus filed his petition in insolvency June 3, 1889.

W. S. B. Hopkins, for the defendant.

E. P. Pierce, for the plaintiff.

MORTON, J. The question in this case is whether the deeds from Cyrus F. Boutelle to the defendant were given in contravention of the insolvent law.

It is stated in the agreed facts that at the time the defendant took them, and when the loan was made for which they were given to him as security, Cyrus was insolvent, and knew himself to be so, and the defendant had reason to believe him to be so. It is not stated that the deeds were taken or that the money was advanced by the defendant with a view to enable Cyrus to prefer the bank, or to evade in any way the insolvent law; that is denied in the defendant's answer. We understand the question, therefore, to be whether, on the agreed facts as they stand, without anything more, the deeds, as matter of law, were in contravention of the insolvent law.

It appears that Cyrus had a note coming due at a bank in Fitchburg. The day before it fell due the indorsee declined to renew it. Cyrus thereupon applied to the defendant, saying that the action of the indorsee put him in a tight place, and asking the defendant to get the money for him on his (Cyrus's) note, and saying he would give the defendant security on two lots, naming them, either by mortgage or warranty deed. Instead of getting the money in the manner Cyrus suggested, the defendant himself advanced the money and kept the note, which was dated April 10, 1889. Owing to his absence at Worcester as a witness, and by reason of other pressing business, Cyrus was unable to complete the transaction till April 23d, when he made and delivered as security to the defendant warranty deeds of the two lots.

The petitioner contends that the arrangement between the defendant and Cyrus contemplated the giving of security at a future time, and not as a part of or contemporaneous with the lending of the money, and that when the defendant received the deeds he took them as an unsecured creditor receiving security for an unsecured debt. We do not think the transaction can be so regarded.

The proposal to give security was made at the same time as and as a part of the request for the loan. It was made before the money was lent, to induce the lending of it, and the money was lent, for aught that appears, in good faith, on the promise of the security. The only reasonable construction to be given to the letter of Cyrus is, that it was expected and intended by the parties that the lending of the money and the giving of the security would be contemporaneous, and that Cyrus understood that he was to give, and the defendant that he was to receive, present security for a present loan. The accidental delay could not affect the real character of the agreement, or what was done. The situation of the debtor remained unchanged, and there is nothing to show that the delay was for the purpose of giving credit. When the security was given, equity would treat it, on the principle that a thing is considered done at the time when it ought to have been done, as if it had been given at the time agreed; and at law possibly the interval might be disregarded, and the agreement and the giving of the deed be regarded as contemporaneous: *Gardiner v. Gerrish*, 23 Me. 46; 1 Story's Eq. Jur., sec. 619; *Nickerson v. Baker*, 5 Allen, 142; *Hanks v. Locke*, 139 Mass. 205; 52 Am. Rep. 702; *Commonwealth v.*

Devlin, 141 Mass. 423, 431; *Cartwright v. Wilmerding*, 24 N. Y. 521, 533, 534.

The cases relied on by the petitioner on this branch of the case are readily distinguishable from this case. In *Blodgett v. Hildreth*, 11 Cush. 311, the agreement to give security was clearly executory, and at the time security was given there was clearly an antecedent debt. In *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475, a former mortgage was surrendered and a new one was taken on other property to secure a debt that had existed some time. The second mortgage was clearly invalid. The same is in substance true of *Simpson v. Carleton*, 1 Allen, 109, 79 Am. Dec. 707. *Holmes v. Winchester*, 135 Mass. 299, is the strongest case cited by the petitioner, but the conveyance which was the subject of controversy was not made till two years and four months after the time when it should have been made. The court expressly said that the evidence was "consistent with the view that she [the plaintiff] did not expect a present conveyance from her husband, but left it to be made by him at some time in the future." The case of *Copeland v. Barnes*, 147 Mass. 388, stands on the same ground in effect as *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; as does also *Paine v. Waite*, 11 Gray, 190.

On the other hand, we think the view which we have taken is supported by numerous authorities: *Williams v. Coggeshall*, 11 Cush. 442; *Nickerson v. Baker*, 5 Allen, 142; *Stetson v. O'Sullivan*, 8 Allen, 321; *Alden v. Marsh*, 97 Mass. 160; *Parsons v. Topliff*, 119 Mass. 245; *Atlantic Nat. Bank v. Tarener*, 130 Mass. 407; *Holmes v. Winchester*, 133 Mass. 140; *James v. Newton*, 142 Mass. 366; *Tiffany v. Boatman's Institution*, 18 Wall. 375; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Ex parte Ames*, 1 Low. 561; *Sparhawk v. Richards*, 12 National Bankruptcy Register, 74.

The fact that the agreement related to the conveyance of real estate was not in *Nickerson v. Baker*, 5 Allen, 142, regarded as a valid objection. Moreover, the agreement has been executed and the defendant has got his security, and as the court said in *Holmes v. Winchester*, 135 Mass. 299, 302, "can set up . . . any equities that will avail her." As already said, the money was lent and the security taken, for aught that appears, in good faith. It is not enough to avoid the conveyance that Cyrus was insolvent when it was made, and knew himself to be so, and that the defendant had reason to believe him to be so, if the conveyance was not made to

secure an antecedent debt, or with any intention on the part of the defendant to defeat the provisions of the insolvent law, or with reason to believe that such was the purpose of Cyrus, but was given as security for a debt then incurred: *Nickerson v. Baker*, 5 Allen, 142; *Tiffany v. Boatman's Institution*, 18 Wall. 375. It does not appear that such was the intent of the defendant, or that he had reason to believe that such was the purpose of Cyrus. There is nothing stated as to the nature of the business of Cyrus or his means, or tending to show that these conveyances were out of the usual or ordinary course of his business, which the statute makes *prima facie* evidence of such a purpose. For aught that appears, his property may have consisted largely of real estate, and this may have been with him a customary mode of raising money at any time when he was pressed. No doubt the defendant had reason to know, and did know, that Cyrus intended to pay the note at the bank; but whether he had reason to believe that such a payment would be in fraud or an evasion of the insolvent laws would depend on the situation of Cyrus, the amount of his property, the nature of his business, whether he could reasonably hope to go on, and other circumstances which are not stated. It cannot be said that, from the mere fact that a person lending money to another in embarrassed circumstances knows that the borrowed money is to be applied to the payment of a prior debt, the lender has reason to believe that the intended payment will be in fraud or an evasion of the insolvent law. Possibly the borrower may succeed in going on, in which case the payments clearly would not be fraudulent. Even if he fails, there may have been fair ground for the expectation that he would not fail. A debtor in embarrassed circumstances may borrow, and a lender may lend, even with knowledge that the borrower intends to apply the money to the payment of his debts, so long as the loan is made in good faith, and without any fraud upon or evasion of the provisions of the insolvent law: *Tiffany v. Boatman's Institution*, 18 Wall. 375.

It does not appear from the agreed facts that the defendant had any reason to believe that there was to be any fraud upon or evasion of the provisions of the insolvent law. A majority of the court think that the decree of the superior court should be reversed, and that as it is conceded that the deeds were taken as security, a decree should be entered to that effect, allowing the assignee, if he shall so elect, to redeem within a

certain time upon paying what shall appear to be due; otherwise bill to be dismissed with costs.

INSOLVENCY — CONVEYANCES IN CONTRAVENTION OF THE LAWS REGARDING. — An insolvent debtor may make a valid sale of property, if made *bona fide* for a full consideration, and may prefer one creditor to another if not restrained by the insolvent laws: *Kimball v. Thompson*, 4 Cush. 441; 50 Am. Dec. 799; but a preference may, under the statutes of Massachusetts, be avoided if made by one who is insolvent with intent to give a preference to a creditor who has a reasonable cause to believe that the debtor is insolvent or in contemplation of insolvency: *Denny v. Dana*, 2 Cush. 160; 48 Am. Dec. 655. In order to make out that a creditor has reasonable cause to believe his debtor insolvent, knowledge must be shown of some fact or facts calculated to induce a reasonable belief that the latter is insolvent; but if such facts are known to the creditor as are clearly sufficient to put a person of ordinary prudence on inquiry, he is chargeable with the knowledge which such inquiry would have furnished him: *Dow v. Sulphin*, 47 Minn. 479; *Baummann v. Cunningham*, 48 Minn. 292; *Holcombe v. Ehrmanntraut*, 46 Minn. 397. An exception to the general rule above stated is that a conveyance which, standing alone, would be void as a preference under the insolvent law, is not thus avoided if it is made pursuant to a prior valid and enforceable contract legally obligating the debtor to make the conveyance: *Williams v. Clark*, 47 Minn. 53. A *bona fide* mortgage of his property made by an insolvent debtor, in ignorance of his insolvency, not with the intention of closing his business, but with a view of continuing and extending it, is not made "in view of insolvency," within the meaning of the act: *Utley v. Smith*, 24 Conn. 290, 63 Am. Dec. 163; compare *Turner v. Iowa Nat. Bank*, 2 Wash. 192; but if such a mortgage is really designed to operate as the means of transferring the debtor's property to one creditor in preference to the others, it will be regarded as within the prohibition of the insolvent laws: *Meinhard v. Strickland*, 29 S. C. 491; *Archer v. Long*, 32 S. C. 171.

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A CONTRACT TO BREAK THE LAWS OF A FOREIGN COUNTRY IS INVALID.

Therefore a sale of property which the purchaser contemplates is to be resold contrary to the laws of a neighboring state, and which requires an act on the part of the seller in furtherance of such scheme, is invalid.

CONTRACT HAVING A VIEW TO A VIOLATION OF THE LAWS OF A SISTER STATE.

The sale and delivery of liquors in Massachusetts with a view of having them resold by the purchaser in Maine, in violation of the laws of the latter state, will not sustain an action in the former state for the price agreed to be paid for such liquors.

A. J. Pratt, for the plaintiffs.

C. C. Powers, for the defendant.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in

Massachusetts by the plaintiffs to the defendant, a Maine hotel-keeper, with a view to their being resold by the defendant in Maine, against the laws of that state. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is, whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws: *Holman v. Johnson*, 1 Cowp. 341; Pollock on Contracts, 5th ed., 308. See also *M'Intyre v. Parks*, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce: *Pe'lecat v. Angell*, 2 Cr. M. & R. 311, 313; and has not escaped criticism: Story on Conflict of Laws, secs. 254, 257, note; 3 Kent Com. 265, 266; and Wharton on Conflict of Laws, sec. 484; although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws: See *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 Barn. & C. 93, 98, 99; *Harris v. Runnels*, 12 How. 79, 83, 84.

Of course, it would be possible for an independent state to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws; but in fact no state pursues such a course of barbarous isolation. As a general proposition it is admitted that an agreement to break the laws of a foreign country would be invalid: Pollock on Contracts, 5th ed., 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the

scheme: *Waymell v. Reed*, 5 Term Rep. 599; *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514; *Hull v. Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact: *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrong-doer, you must show that he actually contemplated the act: *Hayes v. Hyde Park*, 153 Mass. 514-516.

Between these two extremes a line is to be drawn; but as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law: *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Hodgson v. Temple*, 5 Taunt. 181. So, of the law of another state: *M'Intyre v. Parks*, 3 Met. 207; *Sortwell v. Hughes*, 1 Curt. 244; *Green v. Collins*, 3 Cliff. 494; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Dater v. Earl*, 3 Gray, 482, is a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way: *Finch v. Mansfield*, 97 Mass. 89, 92; *Suit v. Woodhall*, 113 Mass. 391, 395; and the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law: *Pearce v. Brooks*, L. R. 1 Ex. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another state has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void: *Webster v. Munger*, 8 Gray, 584; *Orcutt v. Nelson*, 1 Gray, 536, 541; *Hubbell v. Flint*, 13 Gray, 277, 279; *Adams v. Coulliard*, 102 Mass. 167, 172, 173. Even in *Green v. Collins*, 3 Cliff. 494, and *Hill v. Spear*, 50 N. H. 253; 9 Am.

Rep. 205, the decision in *Webster v. Munger*, 8 Gray, 584, seems to be approved. See also *Langton v. Hughes*, 1 Moore & S. 593; *McKinnell v. Robinson*, 3 Mees. & W. 434, 441; *White v. Buss*, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in *Hayes v. Hyde Park*, 153 Mass. 514, and *Tasker v. Stanley*, 153 Mass. 148. The overt act of selling, which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods; but we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is, whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine — the tendency of the act to produce the result — is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare *Commonwealth v. Churchill*, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*, 8 Gray, 584, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act: See *Commonwealth v. Harrington*, 3 Pick. 26.

The ground of the decision in *Webster v. Munger*, 8 Gray, 584, is, that contracts like the present are void. If the contract had been valid, it would have been enforced: *Dater v.*

Earl, 3 Gray, 482; *M'Intyre v. Parks*, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied, whether the law to be violated is that of the state of the contract or of another state (see *Tracy v. Talmage*, 14 N. Y. 162, 213; 67 Am. Dec. 132), at least the right to contract with a view to a breach of the laws of another state of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens: *Territt v. Bartlett*, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by *Webster v. Munger*, 8 Gray, 584, and we believe that it would have been decided as we decide it if the action had been brought in Maine instead of here: *Bancho v. Mansel*, 47 Maine, 58.

Exceptions sustained.

SALES HAVING IN VIEW THE SUBSEQUENT VIOLATION OF FOREIGN OR DOMESTIC LAW. — There is no doubt that while the laws of a foreign state or nation can in no proper sense said to be in force elsewhere, yet they may often be taken into consideration for the purpose of determining whether or not a contract shall be treated as valid and enforceable. "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case, the law of the place of performance is to govern. If valid there, it is by the general rule of nations, *jure gentium*, held valid anywhere, by the tacit or implied consent of the parties": Story on Conflict of Laws, sec. 242. "The same rule applies *vice versa* to the invalidity of contracts. If void or illegal by the law of the place of contract, they are generally held void and illegal everywhere": Story on Conflict of Laws, sec. 243. Therefore it is beyond controversy that if a sale or other agreement or transaction is entered into between parties in a state or nation by whose laws it is forbidden and invalid, it will be regarded as equally invalid in every other state or nation in which either of the parties attempts to assert any right or to enforce any remedy dependent upon it, although had it been entered into in the latter place, it would have conflicted with no law and been forbidden by no recognized public policy: *Chambers v. Church*, 14 R. I. 398; 51 Am. Rep. 410; *Kennedy v. Cochrane*, 65 Me. 594; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285.

If the place in which a contract is to be performed is not within the state or nation in which it was entered into, then, as is implied by the quotation already made "there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance": Story on Conflict of Laws, sec. 280; *Andrews v. Pond*, 13 Pet. 65. There are *dicta* to the effect that, though a contract is valid at the place where it is to be performed, it cannot be enforced if void by the law of the

place where it was made: *Hyde v. Goodnow*, 3 N. Y. 266; *McDaniel v. Chicago etc. R'y*, 24 Iowa, 412; *Adams v. Robertson*, 37 Ill. 45. If any cases exist to which this rule is applicable, they must be very rare and exceptional. It is well settled that if a contract, by the laws of the place of its execution, is void for usury, it is nevertheless valid at the place where it is to be performed, if no usury laws are in force there; or, if in force, the rate of interest stipulated for is not forbidden by them: *Butler v. Myer*, 17 Ind. 77; *Andrews v. Pond*, 13 Pet. 65; *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294.

The principle to which we have just referred, to wit: that a contract if illegal at the place where it is to be performed is invalid elsewhere, does not necessarily control the determination of questions like those involved in the principal case, though to us they seem to fall within the spirit of the rule, or at least, within the reasons doubtless contributing to its adoption. We assume that the reason why a contract, void by the law of the place where it is to be performed, is deemed none the less void because it happened to be entered into within the territorial jurisdiction of another state or nation, is because no state or nation upon considerations of comity will so far aid in the violation of the laws of another as to compel respect for contracts intended to violate or evade them and thereby to directly promote and encourage what has been forbidden: *Smith v. Godfrey*, 28 N. H. 379, 381; 61 Am. Dec. 617; *Story's Conflict of Laws*, secs. 244-247; *Davis v. Bronson*, 6 Iowa, 416. This reason applies with great force to sales, which, though valid in the state where made and fully consummated there, have for their object, participated in by both parties, the ultimate violation of the laws of a sister state. In fact such sales are treated as if their ultimate object were the violation of the laws of the state in which they were entered into, and as a general rule, where a contract for the sale of property is entered into between the parties with a view or common purpose of violating either the laws of the place of its execution or of a foreign state or country, it is equally invalid and unenforceable, whether the action thereon be brought in the one place or the other.

If a sale of property is made for the purpose of having it smuggled into a foreign country or resold under circumstances making such resale unlawful at the time and place where it is to be made, whether in a foreign country or state or not, the original sale, though not necessarily invalid, must be so pronounced if the vendor aids in the illegal purpose, or in other words if there was a union of intent between him and his vendee: *O'Bryan v. Fitzgerald*, 48 Ark. 487; *Branch v. Mausel*, 47 Me. 58. "The doctrine of these and other cases is, that the mere knowledge of the illegal purpose for which goods are purchased will not affect the validity of the contract of sale in the country to which they are to be taken and sold. If the goods are sold and delivered in the government where the contract is made, and the sale there would be legal, and nothing remains to be done by the vendor to complete the transaction and he is not in any way to be further connected with it, an action can be maintained for the recovery of the price; but if it enters at all as an ingredient into the contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, the contract will not be enforced; or, if the goods are sold to be delivered in the place where the sale is prohibited, the purchaser will not be held liable. The sale in such instance would not be complete in the foreign state, and the contract, being repugnant to the law of the country which made the prohibition, could not there be enforced. The principle, as we

have above stated, will not we think be found to be controverted by any well-considered case. It has been animadverted upon by some elementary writers, but they all admit, we believe, that such is the law. There are cases which hold that where a sale is made in a state or country of goods to be used in the same country in violation of law, and the seller is aware of the illegal purpose at the time, he cannot enforce his contract in the courts of that country; but these authorities do not extend to contracts made in a foreign state, where the sale and use is legal": *Smith v. Godfrey*, 28 N. H. 379, 383; 61 Am. Dec. 617.

It must be remembered that to invalidate a sale there must be a union of intent between the vendor and the vendee. It is not sufficient that the vendor was indifferent and did not care what was the intent of his vendee, or was put upon inquiry concerning it, or that he had actual knowledge of it: *Dater v. Eurl*, 3 Gray, 482; *Cheney v. Duke*, 10 Glyn & J. 11; *Gaylord v. Sorangen*, 32 Vt. 110; 76 Am. Dec. 154; *Tracy v. Talmange*, 14 N. Y. 162; 67 Am. Dec. 132; *Holman v. Johnson*, Cowp. 341; *McKinney v. Andrews*, 41 Tex. 363; *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Labbe v. Carbett*, 69 Tex. 503; *Tuttle v. Holland*, 43 Vt. 542; *M'Intyre v. Parks*, 3 Met. 207; *Braunn v. Keally*, 146 Pa. St. 519; 28 Am. St. Rep. 811; *Green v. Collins*, 3 Cliff. 494.

At least in all cases in which the property might under some circumstances be lawfully resold in the state into which it is to be shipped, no presumption will be indulged, in the absence of evidence on the subject, that the vendor united with the vendee in any illegal purpose or intent or aided, or intended to aid, in its accomplishment: *Wagner v. Breed*, 29 Neb. 720-733; *King v. Fries*, 33 Mich. 275. While, as already shown, the mere knowledge of the unlawful intent of the purchaser is conceded not to be sufficient to invalidate the sale, yet it is said the existence of such knowledge may properly be taken into consideration by the jury in connection with other evidence as tending to prove that the vendor participated in the illegal purpose of his vendee: *Tegler v. Shipman*, 33 Iowa, 194; 11 Am. Rep. 118.

From the rule that knowledge of the guilt of the vendee does not of itself involve the vendor in such guilt, it follows that in every case something beyond such knowledge must be shown in all states wherein the rule and its obligation are recognized. Nor can the vendor be held to have participated in the unlawful intent, and the acts required to carry it out, from the fact that he did the acts necessary to complete the sale and deliver the property, and that, as the result from them, it necessarily followed that the property reached the vendee, and he would thereby be enabled to effectuate the known illegal intent with which his purchase was made. Hence, where a person ordering liquors resides in a state in which it is unlawful for him to sell them, and the person of whom they are ordered knows that they are purchased with intent to unlawfully sell them in the state of the purchaser's residence, and ships them to the vendee with knowledge that they are to be resold in violation of law, the sale is nevertheless valid, and a contract to pay the price of the goods sold may be enforced: *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Tuttle v. Holland*, 43 Vt. 542; *Bowman Distilling Co. v. Nutt*, 34 Kan. 724; *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Webber v. Donnelly*, 33 Mich. 469; *Kerwin v. Doran*, 29 Mo. App. 397; *Braunn v. Keally*, 146 Pa. St. 519; 28 Am. St. Rep. 811. In harmony with these decisions are those determining that if property is sold with knowledge that the purchaser intended to use it in a house kept by him for purposes of prostitution: *Hubbard v. Moore*, 24 La. Ann. 591; 13 Am. Rep. 128; *Mahood v. Tealza*, 26 La. Ann. 108; 21 Am. Rep. 546; or to

engage with it in the military service of the Confederate States during the Rebellion; *Wallace v. Lark*, 12 S. C. 576; 32 Am. Rep. 516; *Tedder v. Odum*, 2 Heisk. 68; 4 Heisk. 668; 5 Am. Rep. 25; *McGavock v. Puryear*, 6 Cold. 34; *Hedges v. Wallace*, 2 Bush, 442; 92 Am. Dec. 497; *Brunswick v. Valleau*, 50 Iowa, 120; 32 Am. Rep. 119; or to employ it in a gambling-house when the conducting of such house is forbidden by law: *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 139; *Beckel v. Sheets*, 24 Ind. 1; *Rose v. Mitchell*, 6 Col. 102; 45 Am. Rep. 520; he cannot on either of such grounds avoid such sale nor defeat an action for the purchase price. Possibly the decisions respecting the sale of property known to be intended for use by the enemy during the Rebellion were not well considered, for it is doubtless the judgment of the national courts that this was a practical aiding and abetting of a crime of so heinous a nature that no action can be sustained in any of our courts founded upon a contract connected with it: *Hanauer v. Doane*, 12 Wall. 342; *Light-foot v. Tenant*, 1 Bos. & P. 551, 556; *Wood v. Stone*, 2 Cold. 369; 88 Am. Dec. 601. It is very difficult to state any rule in the application of which to all cases within classes just referred to the courts would agree. Perhaps, as a general rule, if the property sold was such as might be lawfully used without employing it for immoral or forbidden purposes, the courts might assume that the purchaser might, after purchasing, change his unlawful purpose, and therefore that the sale to him was not necessarily invalid: *Braunn v. Keally*, 146 Pa. St. 519; 28 Am. St. Rep. 811. It is clear, however, that if from the evidence before the court it appears that there was any union of purpose between the vendor and the vendee, or that the former intended and desired to facilitate the purposes of the latter, then the sale itself was unlawful; and there have doubtless been instances in which, from the mere fact of the sale and the knowledge by the vendor of the ultimate forbidden object, he has been presumed to have intended to facilitate and promote such object, and denied all right of recovery: *Green v. Collins*, 3 Cliff. 504; *Bowry v. Beckett*, 1 Camp. 349; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Cunningan v. Bryce*, 3 Barn. & Adol. 179; *McKinnell v. Robinson*, 3 Mees. & W. 434.

As there is no presumption of a guilty purpose on the part of the vendor and an actual participation in the intent of his vendee or in the measures resorted to to accomplish it, is required to render the original contract of sale invalid and any agreement based upon it non-enforceable, it is obvious that in few instances can evidence sufficient to invalidate a contract of sale be procured, it only remains for us to direct attention to the somewhat infrequent cases in which the evidence has been adjudged to establish the illegality of the contract under consideration. Before referring to these cases we must be permitted to call attention to the principal case for the purpose of expressing our doubt as to whether it was intended to conflict with principles already stated. The evidence in the case was not presented to the appellate court. Its decision was based solely upon the finding by the trial court that liquors were sold in Massachusetts "with a view to their being resold by the defendant in Maine, against the laws of that state." What this finding meant we have no means of knowing. If it signified that the vendor in some manner aided in the resale or agreed to do so, or that it was a part of the contract of sale that the liquors should be resold in Maine in violation of its laws, there is no doubt the decision was correct. The appellate court understood this finding to mean "that the seller expected and desired the buyer to sell unlawfully in Maine and intended to facilitate his doing so, and that he was known by the buyer to have that intent." If this construction of the finding was correct, there can

be no doubt that the decision was equally so, and that it does not conflict with the other authorities herein before cited: *Foster v. Thurston*, 11 Cush. 322. In another case of the sale of liquors in Massachusetts intended to be unlawfully resold in Maine, the participation of the vendor in the intent of the vendee and in the means resorted to to effectuate it, was regarded as sufficiently proved by evidence showing that the vendor after shipping the goods upon a schooner advised his vendee thereof, suggesting the danger of their seizure, and that care must be taken: *Bancher v. Mansel*, 47 Me. 58. "If it entered at all as an ingredient of the contract between the parties that the goods sold should be transported to another state and there be sold in violation of the law of that state, or that the seller should do some act to facilitate the illegal intention of the purchaser, such as packing the liquors in a way to conceal their character, or any other act to promote the illegal design of the purchaser, then the seller is a participant in the illegal transaction, and the contract will not be enforced": *Green v. Collins*, 3 Cliff. 501. Hence where it appeared that liquors were sold in New York to be shipped to Vermont, and there resold in violation of the laws of the latter state, and the vendee requested the seller when he forwarded the liquors to put no other marks on the casks than a diamond mark with the letter "S" in it, and the purpose of having them so marked was to prevent their seizure by the officers of the state for the violation of its laws, and that the vendor knew this purpose, he was held to have participated in it and to be thereby precluded from recovering the purchase price: *Gaylor v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154. Of similar purport are *Aiken v. Blaisdell*, 41 Vt. 655; *Materne v. Horwitz*, 101 N. Y. 469; *Fisher v. Lord*, 63 N. H. 514. So, if goods are ordered for a purpose known to be unlawful, and directions are given to put them up in a designated manner or form, the manifest object of which is to aid in the unlawful disposition, and the vendor complies with such directions, he thereby so participates in the unlawful purpose that he cannot recover for the goods furnished by him: *Skiff v. Johnson*, 57 N. H. 475.

By a statute of New Hampshire it is made a criminal offense for any person or agent to sell or keep for sale spirituous liquor, or for any person within the state to solicit or take an order for a spirituous liquor to be delivered at any point without the state, knowing or having reasonable cause to believe that if so delivered, the same will be transported to the state and sold in violation of its laws. Before the enactment of this statute, it was held that the fact that an agent of a non-resident vendor solicited orders within the state, and after receiving such orders, sent them to his principal, who thereupon sent the liquor to the state, knowing it was to be illegally sold there, did not establish such a participation in the illegal intent as avoided the sale or the right to recover thereon: *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; but after the statute made the soliciting of the contract illegal, the court determined that any contract growing out of such solicitation must necessarily be tainted with its illegality and therefore non-enforceable, saying: "The plaintiffs stand precisely as they would if they, instead of the agent, had solicited and taken the orders. Having aided, abetted, procured, and hired their agent to violate our laws by soliciting and taking orders for their liquors embraced in this contract, they can with no grace invoke the remedy provided by our laws to recover the price. No rule of comity requires us to enforce, in favor of a non-resident, a contract which had its origin in an open violation of the law, and which could not be enforced in favor of our own citizens, especially where it is offensive to our morals, opposed

to our policy, and injurious to our citizens. Its enforcement would tend to nullify the statute which the plaintiffs have caused to be violated. The law which prohibits an end will not lend its aid in promoting the means designed to carry it into effect. It does not permit in one form what it prohibits in another": *Jones v. Surprise*, 64 N. H. 243; *Long v. Lynch*, 38 Fed. Rep. 489.

We shall now refer to a few decisions which it is not possible for us to reconcile with the other authorities upon the subject. In *Webster v. Munger*, 8 Gray, 584, the evidence tended to prove that the plaintiff, while a resident and doing business in Connecticut, sold liquors to the defendant, thinking it likely that he intended to sell them in Massachusetts in violation of the statutes of that state. Upon this evidence, the action being to recover the price of the liquors so sold, the court instructed the jury, "that if the sales were made in Hartford, in the state of Connecticut, by the plaintiff to the defendant with the knowledge on the part of the plaintiff that the liquors were to be resold in this commonwealth contrary to the law, or if when the plaintiff sold the liquors he had reasonable cause to believe that they were to be resold by the defendant contrary to the laws of this commonwealth, and the sales were made by plaintiff with a view to such resale, in any of these cases the plaintiff cannot maintain this action." The jury having returned a verdict under these instructions in favor of the defendant, the appellate court declared them to be thoroughly sound in principle, and therefore overruled the plaintiff's exceptions. In Vermont, in a case where it was proved that the defendant was a tavern-keeper selling liquors without a license, and therefore contrary to law, and that an agent of the plaintiff, with knowledge of defendant's business and purpose, solicited him to purchase the liquors sued for, and after taking his orders showing the price, time of payment, and quality of the liquors, sent such orders to the plaintiff in New York, who thereupon furnished and shipped the liquors as ordered, it was held that the plaintiff was an abettor of the defendant in the violation of the law, and could not recover: *McConihe v. McMann*, 27 Vt. 95. In Iowa, in an action to recover for liquors sold, the defendant pleaded that they were sold to him by the plaintiff in the state of Illinois with intent to enable defendant to violate the laws of the state of Iowa, and were shipped to defendant in Iowa with knowledge that he intended to sell them contrary to the laws of the state. This answer being demurred to and the demurrer being overruled, the plaintiffs appealed. Thereupon the action of the trial court was sustained. That this action was correct we do not doubt, because the allegation that the sale was made with intent to enable defendant to violate the statutes of the state might properly be construed to mean that the plaintiff and defendant united in a common intent, and were actuated by a common purpose; but there is much in the opinion of the court to support the conclusion that the contract of sale might be disregarded on the sole ground that the state and its citizens might, as a result of it, have been subjected to injury and inconvenience, and that it was inconsistent with the duties, policy, and institutions of the state where it was sought to be enforced: *Davis v. Bronson*, 6 Iowa, 410. So in *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717, where guns were known to have been purchased with intent to use them for an illegal purpose, the court determined as a matter of law that because of his knowledge of the use for which they were intended, the seller concurred with and actively promoted the unlawful purpose of the purchaser, and intimated a doubt whether it was possible when the vendor had knowledge of the vendee's illegal purpose, for him to be guiltless of participation in the unlawful design.

The English and American decisions seem not to be entirely reconcilable upon the question of the effect of a sale or other transaction where one of the contracting parties knows that the other intends the accomplishment of an immoral or forbidden purpose. The English cases apparently infer that the knowledge by both parties of the guilty purposes makes them equally criminal, and equally beyond the protection of the law, and forbids the maintenance of any action by either founded upon the contract: *Pearce v. Brooks*, L. R. 1 Ex. 213; *Taylor v. Chester*, L. R. 4 Q. B. 311; *Cannan v. Bryce*, 3 Barn. & Adol. 179; *McKinnell v. Robinson*, 3 Mees. & W. 434.

CREAMER v. WEST END STREET-RAILWAY CO.

[156 MASSACHUSETTS, 320.]

STREET-RAILWAYS, PASSENGERS ON — WHEN CEASE TO BE. — One who steps from a street-railway to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every occupier, and over which the company has no control. His rights are those of a traveler upon a highway, and not of a passenger. Therefore he cannot recover for injuries received while still standing between the rails of a track of the same railway, under chapter 140 of the statutes of Massachusetts of 1886, for injuries inflicted by another car, unless he affirmatively proves that he was in the exercise of due care to avoid injury in traveling upon such street.

NEGLIGENCE. — THE QUESTION OF ORDINARY CARE is in most cases a question of fact. If, however, as a matter of common knowledge and experience, the court can see from the undisputed facts that the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may properly be told, as a matter of law, that he cannot recover.

NEGLIGENCE — DUE CARE. — **ONE WHO JUMPS FROM A STREET-CAR** in which he has been riding and steps in front of another car going in an opposite direction to the one which he has left and is instantly killed, cannot be regarded as having exercised due care, when it does not appear that he looked to see whether any car was approaching or paid any attention to warnings given him.

THAT part of chapter 140 of the statutes of Massachusetts for the year 1886, which was considered by the court in the opinion in this case, is as follows: "If, by reason of the negligence or carelessness of a corporation operating a street-railway, or of the unfitness, or gross negligence, or carelessness of its servants or agents while engaged in its business, the life of a passenger or of a person, being in the exercise of due diligence and not a passenger in the employment of such corporation, is lost, the corporation shall be liable in damages not exceeding five thousand dollars and not less than five hundred dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents, and

to be recovered in an action of tort commenced within one year from the injury causing the death."

J. D. Long, for the plaintiff.

M. F. Dickinson, Jr. and W. B. Sprout, for the defendant.

BARKER, J. The plaintiff's intestate was instantly killed on Warren Street by an electric car, which, it was testified, was running at a speed of fifteen miles an hour. His death under such circumstances gave the plaintiff a right to maintain the action under the statute of 1886, chapter 140, if when killed he was a passenger, or if, not being a passenger, he was in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck, he was walking across Warren Street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren Street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street. We are of opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *McKimble v. Boston etc. R. R. Co.*, 139 Mass. 542; *Dodge v. Boston etc. Steamship Co.*, 148 Mass. 207, 214; 12 Am. St. Rep. 541; but one who steps from a street-railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.

The plaintiff, therefore, cannot recover unless she shows by affirmative evidence that the deceased was in the exercise of due diligence to avoid injury in travelling upon the street. As was said in *Chaffee v. Boston etc. R. R. Co.*, 104 Mass. 108, 115: "The question of ordinary care is, in most cases, even where the facts are undisputed, a question of fact which it is peculiarly the province of the jury to settle"; but as was also said in the same case: "If, as a matter of common knowledge and experience, the court can see that upon all the undisputed facts the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may be properly told, as matter of law, that he cannot recover." "If the whole evidence introduced by the plaintiff has no tendency to show care on his part, but on the contrary shows that he was careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant": *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227, 230; 85 Am. Dec. 700, and cases cited.

All the material evidence bearing upon the question whether the deceased was in the exercise of due diligence is stated in the bill of exceptions. In the opinion of the presiding justice it had no tendency to show that the deceased was in the exercise of due care, and if this view of the evidence was correct, there should be judgment on the verdict which he ordered.

The time of the accident was about half-past eleven o'clock at night. The car on which the deceased was riding was an open car, drawn by horses, and going southerly on Warren Street, approaching Savin Street, near which he lived. The car had transverse seats, and he was sitting on the extreme left of the rear seat. There were two car tracks in the street, and his car was on the right-hand track as he rode southerly. Savin Street led off from Warren Street to the left, and the car which struck him was running northerly on the track at his left. When the car on which he was riding had approached within one hundred and fifty feet of Savin Street, the conductor rang the bell for it to stop at Savin Street. There was a stone cross-walk from Savin Street across Warren Street. The junction of these two streets was a regular stopping-place for electric and horse-cars, and was so marked with the usual posts. Before the car actually stopped, and when the deceased was within five or ten feet of the cross-walk, he rose from his seat and immediately stepped off the car, at right angles, to the left. His car had slowed up, but was still

in motion when he left it, and he stepped in front of another car going northerly upon the other track, and was instantly killed. The car on which he had been riding came to a stop a few feet farther on. The car which struck him was coming down hill, and was moving at a speed of fifteen miles an hour. It was an electric car of the open pattern, lighted, and crowded with people. The gong of this car was ringing, and the passengers upon it were shouting, singing, and whistling, and making a good deal of noise. The street was straight, and there was nothing except the passengers in front of the deceased as he sat in his seat, to obstruct his view of the approaching car before he left his seat, and nothing after he rose to leave the car. When he rose from his seat and started to get off, two men, one the conductor, and the other a fellow-passenger, who were standing on the platform immediately behind him, shouted to him to stop; but he did not appear to hear, and stepped off on the street to go across, and was on the other track, having taken the first step and being in the act of finishing the second when he was struck. When he rose to leave, the dashers of the two cars were opposite each other, and when he touched the ground the car which struck him was not more than five or six feet away. He made no reply to the warnings given him, and did not appear to hear them. The testimony was that he did not appear to pay attention to anything, and the witnesses saw no indication that he took any notice of the approaching car or of the warnings given; that his movement in leaving was so sudden that there was only time to shout to him, and that he jumped from the car and went right along. Without quoting at length from the testimony, it is sufficient to say that it discloses no single indication of the exercise of care or caution on the part of the deceased. There is no evidence that his senses were defective, and no suggestion in the testimony of any other reason for haste in leaving the car than the fact that it was near his destination. We do not, of course, hold that it is, as a matter of law, negligent for one to leave a street-car while it is in motion, or to attempt to cross a street-car track without looking to see whether a car is approaching; but neither of these acts is evidence of due care, and we cannot discover in the testimony reported any evidence that the deceased exercised care or attention of any kind or degree. On the contrary the undisputed evidence shows that, in spite of warnings from those in his immediate vicinity, he suddenly, without precaution,

precipitated himself into a position of great and obvious danger. He no doubt had a right to expect that any cars which might be upon the other track would not run at a dangerous rate of speed, and would be lawfully managed; but this expectation could not excuse him from the exercise of all proper care, and does not relieve the plaintiff from the obligation of proving by positive affirmative evidence that the deceased was in fact in the exercise of due diligence. As there was no such evidence, a verdict for the defendant was rightly ordered.

Judgment on the verdict.

NEGLIGENCE — CONTRIBUTORY — QUESTION FOR COURT OR JURY: See *People's Bank v. Morgolofski*, 75 Md. 432; ante, 403, and note.

NEGLIGENCE — ORDINARY CARE. — The question of what is ordinary care and what is negligence is one exclusively for the jury: *Kilian v. Augusta etc. R. R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410, and note. Whether a person was in the exercise of ordinary care in a particular case is a question of fact for the jury: *Village of Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136, and note. The question of ordinary care is to be determined by the circumstances of each case: *City of Kinsley v. Morse*, 40 Kan. 577.

STREET-RAILROADS — WHEN CONTRACT OF CARRIAGE TERMINATES. — The contract of carriage by a street-railway terminates when the passenger leaves the car: *Central Ry Co. v. Peacock*, 69 Md. 257; 9 Am. St. Rep. 425.

A case very similar to the leading case is *Buzby v. Philadelphia Traction Co.*, 125 Pa. St. 559, 12 Am. St. Rep. 919, in which, as in the leading case, the plaintiff in stepping off one street-car was struck by another going in the opposite direction, and in which he was non-suited for negligence in not keeping a proper look out for such dangers.

INGALLS v. HOBBS.

[156 MASSACHUSETTS, 348.]

LANDLORD AND TENANT — FURNISHED HOUSE, WARRANTY OF CONDITION OF. — One who lets for a short time a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to the well understood purpose of the hirer to use it as a habitation, and may be held answerable in damages if it is not fit for such habitation.

G. E. Smith, for the plaintiffs.

W. F. Dana, for the defendant.

KNOWLTON, J. This is an action to recover five hundred dollars for the use and occupation of a furnished dwelling-house at Swampscott, during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed

statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles, which were apparently in good condition; and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up and declined to occupy it.

The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs; if, however, under said circumstances said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of five hundred dollars (\$500), with interest from date of writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered on an appeal in a case of this kind is the question whether the judgment is warranted by the evidence: Pub. Stats., c. 152, sec. 10; *Charlton v. Donnell*, 100 Mass. 229; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536; *Mayhew v. Durfee*, 138 Mass. 584; *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708; *Rand v. Hanson*, 154 Mass. 87; 26 Am. St. Rep. 210.

The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiffs that it was in a proper condition for immediate use as a dwelling-house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation: *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees.

& W. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it, for a term however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants; but there are good reasons why a different rule should apply to one who hires a furnished room or a furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses, in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house, let for a short time, is in proper condition for immediate occupation as a dwelling: *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Finch-Hatton*, 2 Ex. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees. & W. 68; *Bird v. Lord Greville*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 J. P. (Q. B.) 280.

In *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302; *Smith v. Marrable*, 11 Mees. and W. 5, and *Wilson v. Finch-Hatton*, 2 Ex. Div. 336, cited above, are referred to with approval, although held inapplicable to the question then before the court.

See *Cleves v. Willoughby*, 7 Hill, 83; *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744.

We are of opinion that in a lease of a completely furnished dwelling-house for a single season, at a summer watering place, there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

LANDLORD AND TENANT — IMPLIED COVENANTS. — There is no covenant implied in the demise of a furnished house for immediate use as a residence, that it is reasonably fit for habitation: *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744, and note with cases discussing implied covenants in the lease of houses. See note to *Foster v. Peyser*, 57 Am. Dec. 45; note to *Crouch v. Fowle*, 32 Am. Dec. 356, and numerous cases cited in the opinion.

PLUMMER v. DILL.

[156 MASSACHUSETTS, 426.]

LICENSEE, DUTY OF LAND-OWNER TO. — The owner of land or of a building does not owe to persons coming there for their own convenience or as mere licensees the duty of keeping it in a safe condition.

LICENSEE UPON PREMISES, WHO IS. — One who goes to a building for his own convenience to inquire about a matter which concerns himself alone and not for the purpose of transacting with any occupant any kind of business in which such occupant was engaged, nor in the transaction of any kind of business for which the building was used or designed to be used, is a mere licensee, and cannot recover for injuries received from the unsafe or dangerous condition of the premises.

C. W. Bartlett and E. R. Anderson, for the plaintiff.

J. D. Ball, for the defendant.

KNOWLTON, J. If we assume that it was the duty of the defendant to keep the entrance, stairway, and halls of his building reasonably safe for persons using them on an invitation express or implied, and if we further assume that he negligently permitted them to be unsafe, and that his negligence caused the injury to the plaintiff, and that she was in the exercise of due care, — some of which propositions are at least questionable, — we come to the inquiry whether the plaintiff was a mere licensee in the building, or was there by the defendant's implied invitation.

She did not go there to transact with any occupant of the

building any kind of business in which he was engaged, or in the transaction of which the building was used or designed to be used. She was in search of a servant; and for her own convenience she went there to inquire about a matter which concerned herself alone.

It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who come there by his invitation, express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66; *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846. One who puts a building or a part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any proper purpose.

It is held in England that one who comes on an express invitation to enjoy hospitality as a guest must take the house as he finds it, and that his right to recover for an injury growing out of dangers on the premises is no greater than that of a mere licensee: *Southcote v. Stanley*, 1 Hurl. & N. 247. The principle of the decision seems to be that a guest, who is receiving the gratuitous favors of another, has no such relation to him as to create a duty to make the place where hospitality is tendered safer or better than it is. It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the ben-

efit of the occupant: Pollock on Torts, 417; *Holmes v. North-eastern R'y*, L. R. 4 Ex. 254; L. R. 6 Ex. 123; *White v. France*, 2 C. P. Div. 308; *Burchell v. Hickisson*, 50 L. J. Q. B. 101.

The rule in regard to an implied invitation to places of business is held with equal strictness in New York. In *Larimore v. Crown Point Iron Co.*, 101 N. Y. 391, 54 Am. Rep. 718, it was decided that a person who entered on the defendant's premises to see if the defendant would give him employment was a mere licensee, and that the defendant was not liable to him for an injury caused by the unsafe condition of the place. The diligence of counsel and an extended examination of the authorities have failed to bring to our attention any case in which the owner or occupant of a place fitted up for ordinary use in business has been held by the condition of his premises impliedly to invite persons to come there for a purpose in which the occupant had no interest, and which had no connection with the business actually or apparently carried on there. Precisely how far, under all circumstances, an implied invitation extends, in reference to the persons to be included in it, has not been the subject of very full consideration in this commonwealth, and is hardly capable of exact statement; but in many cases there is language indicating that the invitation extends only to those who come on business connected with that carried on at the place, and for the transaction of which the place is apparently intended. In *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514, Mr. Justice Devens says: "There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated." In *Marwedel v. Cook*, 154 Mass. 235, 236, we find this language: "The general duty which the defendants owed to third persons, in respect to the passages of the building, is well expressed in the instructions to the jury at the trial: 'If the defendants leased rooms in the building to different tenants, reserving to themselves the control of the halls, stairways, and elevator, by and through which access was to be had to these rooms, and the general lighting arrangements of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times and for all persons who were lawfully using the premises, and

using due care, so far as they ought to have reasonably anticipated such use as involved in and necessarily arising out of the purposes and business for which said rooms were leased.'” In *Learoyd v. Godfrey*, 133 Mass. 315, 323, the plaintiff, a police officer, was expressly invited to the premises by a daughter of the occupant to arrest an intoxicated person who was making disturbance in the house. In *Curtis v. Kiley*, 153 Mass. 123, no question was considered or clearly raised about the invitation to the plaintiff. In *Davis v. Central Congregational Soc.*, 129 Mass. 367, 37 Am. Rep. 368, the plaintiff went to the defendant’s church under an express invitation authorized by the defendant, and the object of her visit was among those contemplated by the defendant when the building was erected. The language used in the cases in this commonwealth and in other states indicates that the rule in regard to the extent of the invitation implied from the preparation of property for use in business is the same here as laid down in the cases above cited from the courts of New York and of England: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Elliott v. Pray*, 10 Allen, 378; 87 Am. Dec. 653; *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66; *Heinlein v. Boston etc. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676; *Reardon v. Thompson*, 149 Mass. 267; *Gordon v. Cummings*, 152 Mass. 513; 23 Am. St. Rep. 846; *Curtis v. Kiley*, 153 Mass. 123; *Stevens v. Nichols*, 155 Mass. 472; *Campbell v. Portland Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503; *Parker v. Portland Publishing Co.*, 69 Me. 173; 31 Am. Rep. 262.

In *Low v. Grand Trunk R’y Co.*, 72 Me 313, 39 Am. Rep. 331, it was held that the owner of a wharf was liable to a custom-house officer, who was upon it in the performance of his duty to prevent smuggling in the night-time, for an injury resulting from a defective condition of the wharf. The officer was there to prevent unlawful conduct in connection with the business carried on at the wharf with the consent of the owner, and the owner might fairly be supposed to anticipate and desire, and impliedly to invite, his presence there to protect the defendant’s property from those who would unlawfully use it. Neither the decision nor the cases cited in the opinion, when carefully examined, will be found to give any countenance to the view that one who visits a building for a purpose not connected with the use for which the building

was fitted, or to which it is put, is impliedly invited to come there.

There is a class of cases to which *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644, and *Holmes v. Drew*, 151 Mass. 578, belong, which stand on a ground peculiar to themselves. They are where the defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement, or implied invitation, in these cases, is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be co-extensive with the inducement or implied invitation.

Decisions of the same kind have been made in New York and New Jersey, which are clearly distinguishable, and which have been distinguished on perhaps not very satisfactory grounds, from implied invitations growing out of the preparation of one's place of business for use by his patrons: *Barry v. New York Central etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Vanderbeck v. Hendry*, 34 N. J. L. 467, 471.

On the facts of the case before us, we are of opinion that the plaintiff was a mere licensee in the defendant's building, and that the rulings at the trial were correct.

Exceptions overruled.

In the subsequent case of *Hart v. Cole*, 156 Mass. 475, somewhat similar questions were presented to the court for decision and were decided in the same manner as in the principal case. The defendant leased a building consisting of several tenements, the outside steps of which were used in common as a means of access by the several tenants, and the court regarded the defendant as having a duty to keep these steps "in a reasonably safe condition for the use of her tenants and of other persons using them by her invitation, express or implied." The plaintiff attended a wake in one of the tenements and when coming therefrom was injured while passing down the steps, from a defect therein arising from the negligence of the defendant. There was no evidence tending to show that the decedent whose wake was thus attended "was an acquaintance of the plaintiff, or that she was expressly invited to the wake, or that she was in any way related to any of the occupants of the house." In determining that the plaintiff was a mere licensee and as such not entitled to recover, the court said:—

"In *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, we considered at some length the question whether an owner of real estate fitted up for use

in business is liable for its unsafe condition to one who goes there on business of his own not connected with the business actually or apparently carried on there, and it was held that such a person is a mere licensee, to whom the owner owes no further duty than to refrain from putting traps or pitfalls in his way, and from negligently doing injurious acts to his prejudice. We have now to consider how far an owner of a dwelling-house is liable for its condition to one who comes there without express invitation, and not for the transaction of any kind of business carried on by any of the occupants, and also what should be deemed an implied invitation in a case of that kind. The defendant is liable to a visitor of the tenant for the condition of the steps, if the tenant himself would have been liable had the steps been included in the tenement let, and not otherwise. It seems clear that one coming to a dwelling-house to do business in which he alone is interested cannot expect a warmer welcome, or claim greater care for his safety, than if he went for the same purpose to the place of business of the occupant. In either case he is a mere licensee. In preparing a convenient entrance to his house, one does not invite there peddlers, book agents, and others who come solely for their own convenience or profit. So far as they are concerned, his preparation of his premises for travel is an indifferent act. It has no such relation to them as it has to those who come to do business which he carries on there. The inducement, invitation, and implied representation of safety which he holds out to the latter is not for them, and the law imposes no affirmative obligation and creates no active duty to those who come as volunteers. He merely gives them free license and permission to use his premises, and impliedly agrees that he will not set traps for them, or wrongfully do anything to their injury; but in general they must take his premises as they find them.

“How far an implied invitation is held out under all conceivable circumstances, and whether an implied invitation to come as a guest for friendly intercourse can create a liability greater than that to an ordinary licensee, it is not easy to decide. No case in this country involving these questions has been brought to our attention. In *Southcote v. Stanley*, 1 Hurl. & N. 247, it is said in substance that the liability of an owner of a dwelling-house to a visitor who is there on his express invitation is no greater than that to a licensee. The ground taken by Chief Baron Pollock and his associates seems to be, that a guest, gratuitously enjoying hospitality by express invitation at the house of his friend, must be presumed to have accepted the invitation with an understanding that he is to enjoy only such things as his host possesses, and that to such a guest the host owes no legal duty to furnish him with anything better than he has for himself. In the late case of *Indermaur v. Dames*, L. R. 1 C. P. 274, Willes, J. treats a guest as a mere licensee, and says, on pages 287, 288, that the protection in ordinary cases depends ‘upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. . . . The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.’ In Pollock on Torts, at page 417, the author says: ‘With regard to the person, one acquires this right to safety by being upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest.’ In Campbell on Negligence, at page 64, 2d ed., is this

statement: 'Invitation, therefore, in the technical sense of the word as employed in this class of cases, differs from invitation in the ordinary sense — implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. The guest must take the premises as he finds them, with any risk owing to their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself.'

"It seems to be the rule in England, that an ordinary guest in a dwelling-house, although expressly invited, has no greater rights than a licensee.

"The case at bar does not require us to decide whether that rule should be applied in Massachusetts, for the plaintiff was not on the defendant's premises under an invitation, express or implied. We have already said that the same rule should be applied to one visiting a dwelling-house out of curiosity, or for his own convenience, as if his visit were to a shop or other place of business. We do not doubt that such relations of friendship, or of social intimacy, may exist between individuals as to warrant a finding of an implied invitation to come as a friend at any time, and that one in such relation visiting his friend would have the same rights as if expressly invited, whatever those rights may be.

"Under the doctrines above stated, the plaintiff is forced to contend that whenever a wake is held there is an implied invitation to every one of the same nationality and religion as the deceased person to attend it. Whatever ground there may be for holding that there is an invitation to relatives or near friends, there is no evidence to warrant the application of such a rule in this case; and there is no evidence, and there are no facts of common knowledge to support it in reference to strangers. It may be true that strangers to a deceased person and to his family sometimes go to a dwelling-house and attend his wake or his funeral; but, in the absence of clear proof to support the contrary view, it must be held that such persons are mere licensees, and that the family of a deceased person, in having a funeral or wake in their dwelling-house, do not invite the whole world to come there.

"In the present case there was no evidence to warrant the submission to the jury of the question whether the plaintiff was on the defendant's premises under an implied invitation, and the ruling that the defendant's liability extended to all persons lawfully on the premises was too broad. For these reasons there must be a new trial"; *Hurt v. Cole*, 150 Mass. 477.

A somewhat similar case is that of *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339, in which a recovery was sought against the defendant company on account of injuries received by a child while playing on its premises, from certain coal dumps or cars of a peculiar construction there situate and which were inclosed by a fence, through openings in which children were in the habit of entering for the purpose of playing. The evidence, however, tended to show that the defendant had exercised considerable diligence in attempting to keep its fence closed so as to prevent intrusion on its premises, and that its agents and employees had, in numerous instances, driven children away from the premises, and that they exercised considerable diligence in keeping children out of the yards and away from the neighborhood in which the accident occurred. The jury returned a verdict in favor of the plaintiff, but the judgment founded upon such verdict was reversed by the appellate court in an opinion which, so far as material, is as follows: —

"The law of this case, as developed by the facts recited, may be briefly

stated: 'It is founded on the law of damages *ex delicto*, as announced in the code, which declares that "every act whatever of man that causes damages to another, obliges him, by whose fault it happened, to repair it": Russ. & R. C. C. 2315. "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence . . . or his want of skill": Russ. & R. C. C. 2316. It is founded on fault or neglect.'

"A distinguished author, in a treatise on negligence, says: 'It is enough to say now that a possessor of lands or tenements is not at liberty . . . to plant in them dangerous instruments which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespassers for injuries they may receive from defects, not amounting to traps, in such premises': Wharton on Negligence, secs. 344, 821.

"Again he says: 'If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care': Wharton on Negligence, sec. 826, citing *Coombs v. New Bedford Co.*, 102 Mass. 572; 3 Am. Rep. 506; Wharton on Negligence, sec. 350.

"To such a case, the rule *sic utere tuo*, etc., applies. With reference to children of tender years, it may be conceded that they proceeded with due care, but can it be said that the condition of defendant's fence operated as an 'invitation or procurement, express or implied?'

"Upon this precept another important rule has been formulated by that author, viz.: 'The owner of land or other property may properly inclose dangerous machinery on [his] own premises, such machinery being an essential industrial factor. . . . Hence comes the well established rule that a trespasser who meddles with an instrument in itself dangerous, cannot recover damages for the injuries his meddlesomeness has brought on himself': Wharton on Negligence, sec. 347.

"But the author says further: 'So with regard to leaving a dangerous implement on a thoroughfare. It is negligence to leave such an instrument on a place of public access, where persons are expected to be constantly passing and repassing, and where persons are not required to be on their guard, or where children are accustomed to play; but it is not negligence to leave such an instrument in a private inclosure which, from its very privacy, excludes the public and puts on their guard all who enter': Wharton on Negligence, sec. 112, citing *Railroad Co. v. Stout*, 17 Wall. 657.

"And in referring to that case, the author speaks of the principle therein announced, thus: 'It was held that the company was liable for damages sustained by a boy when playing with a turn-table left by the company unguarded and unlocked on its own grounds, it being shown that the boys of the neighborhood were in the habit of resorting to the place for play, and that this was known to the company': Wharton on Negligence, sec. 860.

"A parallel case is cited from *Lane v. Atlantic Works*, 111 Mass. 136. These various citations from this justly celebrated author, which are predicated on the established jurisprudence of the country, are quite sufficient to show that the instant case does not disclose the defendant's negligence as matter of law; for if little boys did resort to the defendant's premises for purposes of amusement and play habitually, it was certainly against the defendant's wishes and over its agents' and employees' protests, made repeatedly although ineffectually.

"Notwithstanding the fence of the company, inclosing the dangerous coal-dumps and wheels, was frequently open in places, possibly for a greater length of time than it should have been allowed to remain open, yet these openings were not occasioned by the company's employees or persons holding even quasi contractual relations with it; but they were occasioned by acts of trespassers upon their private grounds.

"And the proof is clear that the agents and employees exercised ordinary care in its safe-keeping. They used timely and repeated efforts to keep the apertures closed. The children were repeatedly warned against the danger and driven away; and on more than one occasion they were pulled off of the fence.

"Mr. Hutchinson announces the general rule to be that railroad companies are not placed under the 'same degree of obligation as to care and diligence, to guard against injuries to strangers,' as they are to those with whom they have contractual relations; for, with regard to the former, their duty is governed by the general principle of law, that every one is obliged, upon consideration of humanity and justice, to conform his conduct to the rights of others, and in the prosecution of his lawful business to use every reasonable precaution to avoid their injury': Hutchinson on Carriers, p. 447.

"And this rule has been sanctioned in many cases: *Snyder v. Natchez etc. R. R. Co.*, 42 La. Ann. 302; *Lott v. New Orleans etc. R. R. Co.*, 37 La. Ann. 337; 55 Am. Rep. 500; *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653; *Canley v. Pittsburgh etc. R'y Co.*, 98 Pa. St. 500; Wharton on Negligence, secs. 300, 301; Thompson on Carriers, 344, 345; *Hearn v. St. Charles etc. R. R. Co.*, 34 La. Ann. 160; *Montfort v. Schmidt*, 36 La. Ann. 750; *Reary v. Louisville etc. R'y Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497. To this rule the case of *Westerfield v. Lewis Bros.*, 43 La. Ann. 67, does not apply; for in that case the negligence of the defendants was fully established by their having left a heavy iron roller, with two mules attached thereto, unattended by a driver, on an open public street, — the mules not fastened, and the wheels of the roller unlocked. The aggravated question in that case was, whether the child, who was mortally injured, was of sufficient age and discretion to have been guilty of contributory fault.

"The general rule as announced by Mr. Wharton, that 'there is no duty imposed upon the owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied' from the surrounding circumstances, has been sanctioned in many cases: *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Pierce v. Whitcomb*, 48 Vt. 127; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *Gramlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep. 684; *Central Bank etc. R. R. Co. v. Henigh*, 23 Kan. 347; *Morgan v. City of Hallowell*, 57 Me. 375; *Illinois Cent. R. R. Co. v. Carreher*, 47 Ill. 333; *Murray v. McLean*, 57 Ill. 378.

"In conclusion, we cannot do better than quote an illustration of the rule stated from the case of *Hargreaves v. Deacon*, 25 Mich. 1, in which the plaintiff sued as administrator of his minor child of tender years, who was killed by falling into a cistern of the defendant, which had been left uncovered; and in stating the duty of protection and care on the part of the proprietor, the court say: 'If on private property, not open of right to the public, it applies less generally, and only to those who have a legal right to be there, and to claim the care of the occupant for their security, while on the premises, against negligence, or to those who are directly injured by some positive act involving more than passing negligence.'

'Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence on private premises can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there, as to a place of business, or of general resort held out as open to customers or others whose lawful occasions may lead them there. We have found no support for any rule which would protect those who go when they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience in no way connected with business or other personal relations with the occupant. On a full and exhaustive examination of the facts furnished in the record, and all the authorities appertaining thereto, we are fully convinced that the negligence of the defendant is not made out, and the plaintiff's case must fail, and the judgment be reversed': *O'Connor v. Illinois Cent. R. R.* 44 La. Ann. 339.

MINOT v. RUSS.

[156 MASSACHUSETTS, 458.]

BANKING. — A CHECK is an order to pay the holder a sum of money at a bank on the presentation of the check or demand of the money; no further notice is necessary; no acceptance is required or expected, and it has no days of grace.

BANKING — CERTIFICATION OF CHECK, WHEN RELEASES DRAWER. — If a drawer in his own behalf or for his own benefit gets his check certified and then delivers it to the payee, the payer is not discharged, but if the payee or holder in his own behalf gets it certified instead of getting it paid, then the drawer is discharged.

F. Brewster, for the plaintiff in the first case.

F. R. Jones, for the defendant in the first case.

W. C. Loring, for the plaintiffs in the second case.

C. A. Williams, for the defendants in the second case.

FIELD, C. J. The first case is an appeal from a judgment rendered by the superior court for the defendant, on his demurrer to the declaration. The defendant, on October 29, 1891, drew a check on the Maverick National Bank, payable to the order of the plaintiff, and being informed by the plaintiff that the check must be certified by the bank before it would be received, the defendant on the same day presented the check to the bank for certification, and the bank certified it by writing on the face of the check the following: "Maverick National Bank. Pay only through Clearing-house. J. W. Work, Cashier. A. C. J., Paying Teller." After it was certified, the check was, on Saturday, October 31, 1891, delivered

by the defendant to the plaintiffs, for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours on said day," and that on that day payment was duly demanded of the bank, and notice of non-payment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the superior court, on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their check on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The check was received too late to be deposited by the plaintiffs for collection in season to be carried to the clearing-house on that day, but during banking hours on that day the plaintiffs presented the check to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following: "Maverick National Bank. Certified. Pay only through Clearing-house. C. C. Domett, A. Cashier. —, Paying Teller."

At that time the defendants had on deposit sufficient funds to pay the check, and the bank on certification charged to the defendant's account the amount of the check, and credited it to a ledger account called certified checks, in accordance with their uniform custom. After certification, the plaintiffs, on the same day, deposited the check in the Hamilton National Bank for collection. It is agreed that if the check had been presented for payment on Saturday, in banking hours, it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the comptroller of the currency placed a national bank examiner in charge, and the bank was put into the hands of a receiver. The clearing-house on November 2d, refused to receive checks on the Maverick National Bank, and the check was on that day duly presented for payment, and due notice of non-payment was given to the defendants.

Each of the checks was in the ordinary form of checks on a bank, and was payable on demand, and no presentment for acceptance or certification was necessary. In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense also it is a distinct commercial instrument; but according to the general understanding of merchants, and according to our statutes, these instruments were checks and not bills of

exchange. "A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money; **no** previous notice is necessary, **no** acceptance is required or expected, it has **no** days of grace. It is payable on presentment, and not before": *Bullard v. Randall*, 1 Gray, 605, 606; 61 Am. Dec. 433. The duty of the bank was to pay these checks when they were presented for payment, if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the checks, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case, the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation; but when the payee or holder of a check presents it for certification the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present cases the checks were seasonably presented to the bank for payment, and on the facts stated the defendants would be liable unless the certification discharged them from liability.

It is argued that the certification of a check, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the check then becomes in effect a certificate of deposit; and it is also argued that the certification is in effect only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of non-payment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank check is **not**, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is

a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the check. The weight of authority is, that if the drawer in his own behalf, or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged: *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St Rep. 312; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 300; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 703; *Boyd v. Nasmith*, 17 Ont. 40; *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 193; *First Nat. Bank v. Whitman*, 94 U. S. 343, 345; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403; *Continental Nat. Bank v. Cornhauser*, 37 Ill. App. 475; *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50; *Larsen v. Breene*, 12 Col. 480; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933; 26 Am. Rep. 126; Morse on Banking, secs. 414, 415. We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified checks necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer.

It may also be said that in the second case the certification amounted to an extension of the time of payment at the request of the payees, without the consent of the drawers. Before the certification of the drawers could have requested the payees to present the check for payment on Saturday, or could themselves have drawn out the money and paid the check. After certification the amount of the check no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing-house, which could not happen before the following Monday. The result is that in the first case the judgment is reversed, and the demurrer overruled, and in the second case the judgment is affirmed.

So ordered.

CHECKS — CERTIFICATION OF, WHEN DISCHARGES DRAWER. — A holder of a check by taking a certificate of it from the bank, instead of requiring payment discharges the drawer: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634;

31 Am. St. Rep. 403, and note with cases collected discussing the effect of the certification of checks; *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312, and note; extended note to *Bickford v. First Nat. Bank*, 89 Am. Dec. 443.

CHECKS — WHAT CONSTITUTE. — A check is a written order on a bank or banker payable on demand: *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488; 16 Am. St. Rep. 718, and note; *People v. Kemp*, 76 Mich. 410; *National etc. Bank v. Weil*, 141 Pa. St. 457. See extended note to *Holmes v. Briggs*, 17 Am. St. Rep. 807.

JACKSON v. STEVENSON.

[156 MASSACHUSETTS, 496.]

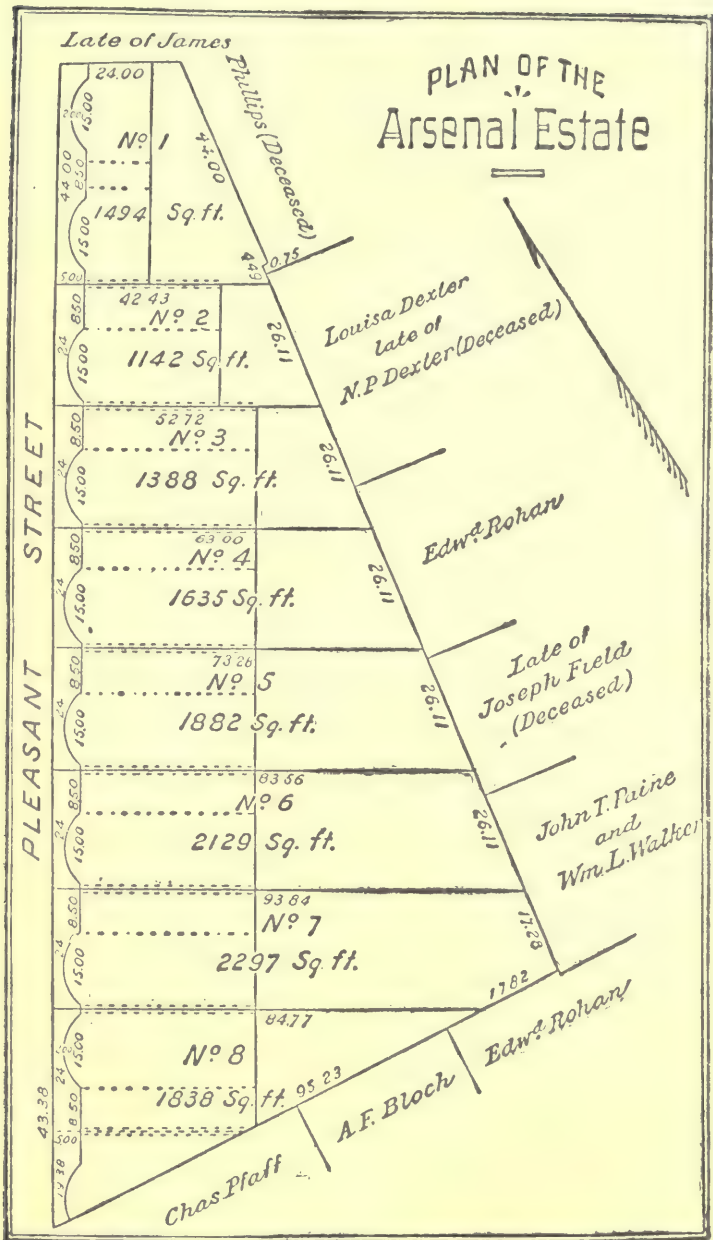
EQUITABLE RELIEF — ACQUIESCENCE. — Whether the right to equitable relief is affected by acquiescence depends upon the circumstances in each case. Where such a defense is claimed, the facts relating to it become material, and may be inquired into.

RESTRICTIVE COVENANTS, WHEN WILL NOT BE ENFORCED. — If the purpose of restrictive covenants inserted in a conveyance is to make the locality a suitable one for residences, but owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can no longer be accomplished, no matter how rigidly the restriction is enforced, it is oppressive and inequitable to give effect to it, and equity will not enjoin its violation, though when there is no remedy at law the bill may be retained for the purpose of assessing damages.

C. Almy and H. M. Spelman, for the plaintiffs.

W. A. Hayes, Jr., for the defendant.

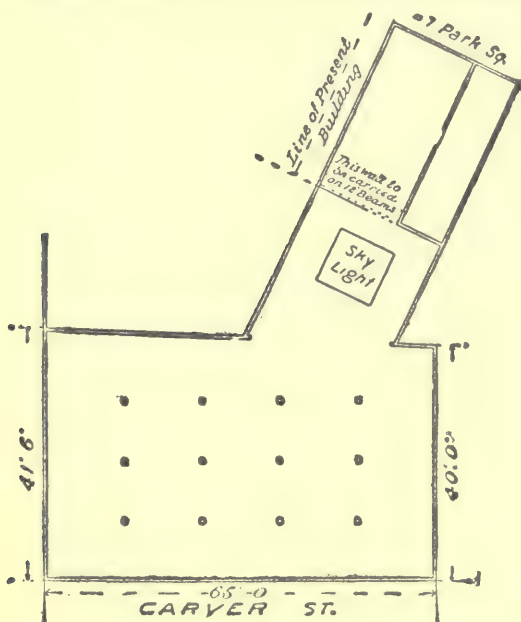
BARKER, J. In the year 1853 the city of Boston owned a parcel of land known as the Arsenal Estate, in the vicinity of the southerly end of the Common. The lot was triangular, but truncated at the northerly end towards the Common, and contained an area of about fourteen thousand square feet, bounded on the west by Pleasant Street, now known as Park Square, and on the other side by lands of private owners. The westerly line was about 232 feet in length, and the greatest depth perpendicular to this line was about 100 feet, while at the northerly end the depth was about 24 feet. At this time the estates surrounding the Common were chiefly used for the more expensive residences. The city caused the land to be divided into eight lots and sold. The most northerly and southerly lots, numbered respectively one and eight, were each about forty-four feet wide, and each of the other lots was twenty-four feet. The plaintiffs are the owners of lot No. 8, while the defendant is the owner of lots numbered four



and five; the other lots are owned by different persons, all deriving title through separate deeds from the city. Each lot was divided, by lines parallel with Pleasant Street, into front and rear portions. The front portion of lot No. 1 was eighteen feet deep; of lot No. 2, thirty-two feet; and of the other lots, forty feet. In order to provide a general building scheme, and to effect a uniform plan, certain restrictive clauses, intended for the benefit of the lots and of the neighborhood, were inserted by the city in its deeds. The first of these clauses related to partition walls, the second to the front lines of the buildings, and the third required the buildings to be of a width equal to the width of the front of the lot. The fourth restrictive clause provided that "No dwelling-house or other building except the necessary outbuildings shall be erected or placed on the rear of the said lot." The fifth clause was as follows: "No building which may be erected on the said lot shall be less than three stories high, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house, apothecary's shop, dry goods store, or grocery store, during the term of twenty years from August 25, 1853."

The city conveyed the lots Nos. 4 and 5 in 1856, and the plaintiff's lot, No. 8, in 1858. All the lots were conveyed by the city before the year 1864, and dwelling-houses of substantially uniform design were built, which now remain upon lots Nos. 3, 4, 5, 6, 7, and 8. The main part of each house is forty feet deep, four stories high, exclusive of basement and attic, and covers the width of its lot, extending back to the line separating the front and rear portions. On the northerly side of the rear of lot No. 7 is a two-story L, about 11 feet wide and 15 feet deep, and between 17 and 18 feet in height, the lower story of brick, and the upper of metal, with flat roof; in the rear of this L, and covering the whole width of the lot, is also a building seven feet high, of brick, connecting with a storehouse on Carver Street, which is the next street easterly. The rear building last mentioned was erected in 1886; the upper story of the L was added in 1878, and the original L existed before 1877. Since 1886 the structures on the rear of lot No. 7 have been used in a wholesale and retail apothecary business, carried on in the buildings on this lot and in connecting buildings on Carver Street. On the northerly side of

lot No. 6 is an extension 32 feet high, 13 feet wide, and 14½ feet deep, with a nearly flat roof, used as part of the main building. This extension has been in its present shape since 1878, and for some years before that date it was one story lower. On the rear of lot No. 3 is a brick L, 9½ feet wide and 39 feet high, extending to the end of the lot. This has existed for many years, and has always been used as a part of the main building. Upon the northerly side of the rear of each of the defendant's lots have existed for many years structures about eleven feet wide, extending from the main buildings to the easterly side of the lots, with roofs sloping to



the south, the north walls being about ten feet high. These extensions have been used for kitchens, laundries, and water-closets. On the top of the north wall of the L on lot No. 5 there has been for many years a trellis of upright posts and cross-bars, partly covered with live grapevine.

No objection had been made by the owners of the plaintiff's estate to any structure erected on any of the lots until this case arose in 1891. The master finds that since August 25, 1873, there has been a considerable change in the character of the neighborhood, the houses being no longer used as dwellings exclusively, but devoted to a considerable extent to

business purposes, and that the neighborhood is now, to all intents and purposes, a business or mercantile one. The defendant, owning property on Carver Street abutting on the rear of lot No. 4, and intending to erect a market on Carver Street, proposed to build over the entire rear portion of lot No. 4, a brick structure with a flat roof and raised skylight, for use as a part of and a connection between the ground floor of the building on lot No. 4 and his Carver Street property, designed as a store or market, its exact use depending upon future tenants. The plaintiffs, upon ascertaining this, gave notice that they should insist on a compliance with the restrictions, and this notice being disregarded, brought their bill, alleging that the defendant is about to erect on lot No. 4 a building which is not a necessary outbuilding, and asking that he may be perpetually enjoined from placing on the rear of lot No. 4 or No. 5 any buildings except necessary outbuildings.

The master finds that the proposed structure is a reasonably necessary outbuilding, if, in construing the fourth restriction, the facts that the operation of the fifth restriction has ceased and that the neighborhood is now used for general business purposes, are to be considered unless the defendant's intention to use it in part as a connection between the Park Square and Carver Street buildings shows that it can be in no sense an outbuilding. The plaintiffs except to this part of the master's report, and also as to his findings as to structures upon the rear of other lots.

The master finds that the proposed structure would cause no appreciable diminution of light or air, nor any perceptible damage to the plaintiffs' estate, beyond the possible technical damage which the law may assume; and that the structures on the rear portion of lot No. 6 and lot No. 7, which lie between the premises of the parties, are of more considerable importance as affecting the plaintiffs' premises than the proposed structure would be.

Whether the right to equitable relief is affected by acquiescence depends upon the circumstances of each case. Where such a defense is claimed, the facts relating to it become material, and may be inquired into. The exception to the finding of the master relative to structures upon the other lots must therefore be overruled: *Roper v. Williams*, Turn. & R. 18; *Peck v. Matthews*, L. R. 3 Eq. 515; *Ware v. Smith*, 156 Mass. 186.

We assume that when restrictions inserted in the deed of a particular lot are part of a general scheme for the benefit and improvement of all the lands included in a larger tract, a grantee of any part of the land may, under proper circumstances, enforce them against his neighbor: *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632; *Linzee v. Mixer*, 101 Mass. 512; *Tobey v. Moore*, 130 Mass. 448; *Beals v. Case*, 138 Mass. 138; *Payson v. Burnham*, 141 Mass. 547; and that the restrictions inserted by the city in its deeds were of this nature: *Hano v. Bigelow*, 155 Mass. 341. We also assume that the restrictions, except as expressly limited in duration, were intended to be permanent, and that the structures which the defendant proposed to erect were not necessary outbuildings within the meaning of the fourth restriction: *Keening v. Ayl- ing*, 126 Mass. 404; *Sanborn v. Rice*, 129 Mass. 387, 397; *Ayl- ing v. Kramer*, 133 Mass. 12, 14; *Hamlen v. Werner*, 144 Mass. 396. We also assume that an owner, having the right to enforce such a restriction, if otherwise entitled to sue in equity, is not obliged to wait until after the objectionable structure is erected before bringing his bill: *Peck v. Matthews*, L. R. 3 Eq. 515; and that relief may be granted, although no actual serious pecuniary damage may have been sustained or is to be expected: *Attorney-general v. Algonquin Club*, 153 Mass. 447, 455; and that an owner may neglect to object to infractions of restrictions to some extent without losing his right to enforce the restrictions when they more clearly and seriously affect him: *Linzee v. Mixer*, 101 Mass. 512, 531; *Payson v. Burnham*, 141 Mass. 547, 556.

Assuming these points in favor of the plaintiffs, we are nevertheless of the opinion that an injunction should not be granted in the present case. It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other

effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made: *Duke of Bedford v. British Museum*, 2 Mylne & K. 552; *German v. Chapman*, 7 Ch. Div. 271, 279; *Sagers v. Collyer*, 24 Ch. Div. 180, 187; *Trustees etc. v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Starkie v. Richmond*, 155 Mass. 188.

But as the plaintiffs have no remedy at law against the defendant, the bill should be retained for the purpose of assessing their damages. Upon the master's report they are entitled to some damages, and we do not understand him to find that upon the view which we have taken the damages are merely nominal. The case is to be referred to an assessor to report the damages caused to the plaintiffs by the erection of the structures which the defendant has caused to be built since the bringing of the bill, but an injunction is denied.

So ordered.

RESTRICTIVE COVENANTS. — WHEN WILL NOT BE ENFORCED: See extended note to *Ladd v. Boston*, 21 Am. St. Rep. 418; note to *Drever v. Marshall*, 97 Am. Dec. 686; extended note to *Morse v. Garner*, 47 Am. Dec. 574, 575. A restrictive covenant will not be enforced if the land restricted cannot be profitably used under the covenant and it does not fulfill the purpose for which it was created: *Page v. Murray*, 46 N. J. Eq. 325; *Trustees etc. v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365.

EQUITY — ESTOPPEL. — ACQUIESCENCE: See note to *Cook v. Walling*, 10 Am. St. Rep. 22; note to *Marines v. Collet*, 17 Am. St. Rep. 24; extended note to *Guffey v. O'Reilly*, 57 Am. Rep. 429; note to *Stinchfield v. Emerson*, 83 Am. Dec. 526.

ROBERTSON v. OLD COLONY RAILROAD COMPANY.

[156 MASSACHUSETTS, 525.]

CARRIERS. — ONE WHOM A RAILWAY CORPORATION WAS UNDER NO COMMON LAW OR STATUTORY OBLIGATION TO CARRY in the manner in which he was carried at the time of the accident, is not entitled to enforce against such corporation the obligation and liability of a common carrier.

RAILROAD CORPORATIONS AND EMPLOYEES OF CIRCUS TRAINS. — If the proprietors of a circus contract with a railway corporation for the hauling of certain cars, according to a schedule of time fixed by agreement, the work to be chiefly at night, and the price to be paid a gross sum, stated in the agreement to be less than the regular rates, and the proprietors agree to load and unload the cars, and to exonerate and save harmless the corporation from any and all claims for damages to persons and property during the transportation, however occurring, and to assume all risk of accident from any cause, an employee of the circus cannot recover of the railway for injuries received by him from one of the cars being out of proper condition, for the railway was not under any duty to inspect the cars, and had no control over their condition.

E. Greenhood, for the plaintiff.

J. H. Benton, Jr., for the defendant.

LATHROP, J. Unless the defendant was under a common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus, whose servant the plaintiff was. By the terms of this contract, the defendant agreed to haul certain cars belonging to the circus proprietors, according to a schedule of time fixed by the agreement, by which the work was to be done at eighteen different times, and nearly all of it at night. The price to be paid was a gross sum, stated in the agreement to be less than the regular rates of the defendant for such service. The proprietors agreed, at their own expense, and under their own supervision, and without responsibility on the part of the defendant, to load and unload the cars; "to exonerate and save harmless" the defendant "from any and all claims for damages to persons and property during the transportation aforesaid, however occurring"; and to "assume all risk of accident from any cause."

The plaintiff's evidence tended to show that the injury occurred by one of the cars running off the track, by reason of its trucks not being in proper condition, and contended that that fact was evidence that proper inspection of the trucks by the defendant would have revealed their condition; and that the defendant was bound to make such inspection.

We need not consider whether the offer or proof was sufficient, if it was the duty of the defendant to inspect the cars, for we are of opinion that it was not its duty to inspect the cars. The defendant had no control over the condition of the cars, and no power to interfere with them. The contract was simply to haul the cars as they were. This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier: *Coup v. Wabash etc. R'y Co.*, 56 Mich. 111; 56 Am. Rep. 374.

The ruling of the judge below was right; and, according to

the terms of the report, there must be judgment on the verdict for the defendant.

So ordered.

CARRIERS — LIABILITY FOR TRANSPORTING CIRCUS TRAIN. — A railway company contracting to transport a menagerie in cars owned and controlled by the owners of the menagerie, and run on a schedule to suit them, is not liable as a common carrier and may stipulate for exemption from liability: *Coup v. Wabash etc. R'y Co.*, 56 Mich. 111; 56 Am. Rep. 374.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

WILSON v. HOFFMAN.

[93 MICHIGAN, 72.]

TROVER MAINTAINABLE FOR TIMBER CUT ON AND REMOVED FROM LAND WHILE HELD ADVERSELY.—A person who has recovered land in an action of ejectment may maintain an action of trover for timber cut upon and removed from the premises by the defendant while in possession under claim of right; and such action is not barred by a judgment for damages for the rental value of the land recovered by the plaintiff on a claim for rents and profits filed and prosecuted under the Michigan statute.

TROVER MAINTAINABLE BY ONE HAVING RIGHT TO POSSESSION.—In Michigan trover may be maintained by one who has the right to possession, and the actual possession of a plaintiff acquired by ejectment relates to the time when his title was acquired.

Frank Whipple, for the appellant.

Avery Brothers and Walsh, for the defendant.

McGRATH, J. Plaintiff recovered in ejectment against defendant after an adjudication by this court (see 70 Mich. 552), and in April, 1889, filed a suggestion of damages in the circuit court. The bill of particulars of his claim in that proceeding contained the following items:—

For rent of premises 6 years, at \$50 per year . \$300 00

For 296 logs, 33,650 feet of pine logs, cut and
moved by defendant from the land described

in plaintiff's declaration, at \$16 per M. 538 70

For 77 cords of bolts, at \$10. 770 00

On the 8th of October, 1889, the trial resulted in a verdict for plaintiff for \$72.

Before filing the suggestion for rents and profits as above,

plaintiff commenced this action of trover by summons, filing his declaration July 20, 1889, seeking "to recover the value of 500 pine trees, 100 oak trees, 100 hemlock trees, 500 pine logs, 100 oak logs, 100 hemlock logs, 100,000 feet of pine logs, and 100 cords of pine bolts, all of the value of five thousand dollars." Defendant pleaded the general issue, with notice of the pendency of the other suit involving the same matters. After the trial of the proceeding for assessment of damages, upon leave granted, defendant filed an additional notice, setting up the judgment in the other suit as a bar to this action. The learned circuit judge directed a verdict for defendant.

Defendant's contention is: 1. That trover will not lie for the cutting and removing of standing timber from premises while in possession of a defendant in ejectment under claim of right; 2. That the judgment in the action for mesne profits is a bar to the maintenance of the present suit.

It seems to me that the case of *Busch v. Nester*, 62 Mich. 381, 70 Mich. 525, disposes of the first contention. The only difference between the cases is, that in that case the party in possession of the land, and who had cut the logs under a *bona fide* claim of title adverse to the owner, brought replevin against the true owner, who had obtained possession of the logs by questionable methods, before the question of title to the land had been determined; while in the present case the true owner brings trover against the party who cut the logs, under a *bona fide* claim of title adverse to the owner, after the title to the land has been determined in favor of the plaintiff. I am unable to discover why any different rule should be adopted because in this suit *Busch* is the defendant. If in the present case the logs had been upon the land when the ejectment suit was determined, that determination would have established the title in plaintiff. Suppose, however, that before the determination of the ejectment suit the logs had been skidded upon adjoining land, would the ownership or right to possession depend upon which party first reached the skids? As is said in the *Busch* case, as between the wrongdoer and the true owner of the land, the title to what is severed from the freehold is not changed by the severance, whatever may be the case as to strangers. If the true owner may keep his own property when he gets it, why may not he get it if another has it?

An additional reason for the rule laid down in the cases

cited by defendant is, that trover cannot be maintained by one not in actual possession, but the rule is well established in this state that trover may be maintained by one who had the right to possession. The law, after re-entry, supposes the freehold to have always existed in the party re-entering: *Dewey v. Osborn*, 4 Cow. 329; *Morgan v. Varick*, 8 Wend. 587; *Van Brunt v. Schenck*, 11 Johns. 377. As is said by Cowen, J., in *Leland v. Tousey*, 6 Hill, 328: "The answer to the objection is found in the ejectment suit and recovery. The plaintiff was all along in actual possession according to his right. His actual possession, acquired by ejectment or entry, relates to the time when his title was acquired, not only as against the defendant in ejectment, but all other wrong-doers."

As to the second contention, whatever scope may be given to the language "rents and profits," and the proceeding in *assumpsit* for use and occupation, I am of opinion that the remedy is not exclusive, and was not intended to take away other remedies. It is urged by defendant's counsel that a tort may be waived and *assumpsit* brought, but I do not think that the legislature intended to say that in all cases a tort must be waived. It is very clear from what is said in *Busch v. Nester*, 62 Mich. 381, 70 Mich. 525, that in the class of cases there alluded to the owner is not confined to the remedy of ejectment and rents and profits. In any case where replevin could be brought, the statutory remedy might be a barren one. In *Gill v. Cole*, 2 Har. & J. 430, 2 Am. Dec. 527, it is held that a recovery in trespass for mesne profits is only for the use and occupation of the lands, and does not bar an action for injuries done to the premises during the same period. In *Campbell v. Renwick*, 2 Bradf. 84, it is held that the common-law action for the recovery of mesne profits was not abolished by the revised statutes. I think, therefore, that judgment in the proceedings under the statute is not necessarily a bar to the present action.

The judgment must therefore be reversed, and a new trial ordered, with costs to plaintiff.

TROVER, WHEN MAINTAINABLE. — The general rule is, that to maintain trover the plaintiff must have actual or constructive possession of the thing in question at the time of the conversion: *Gage v. Allison*, 1 Brev. 495; 2 Am. Dec. 682; *Lewis v. Mott*, 4 Dev. & B. 323; 34 Am. Dec. 379; *Ring v. Neale*, 114 Mass. 111; 19 Am. Rep. 316. Thus, one who has the right to the possession of a certain tract cannot maintain trover for stone and gravel dug therefrom, against one who has the actual adverse possession of the land, and sets up title thereto: *Mather v. Trinity Church*, 3 Serg. & R. 509; 8 Am. Dec. 663,

and note. On the other hand, the owner of land out of possession may maintain trover for timber cut thereon by one not in actual possession of the premises: *Wright v. Guier*, 9 Watts, 172; 36 Am. Dec. 108, and note. Similarly, a mortgagee entitled to the possession of personal property covered by his mortgage may maintain trover against a third party without first obtaining a judgment against the mortgagor, or making him a party to the action: *Howard v. Burns*, 44 Kan. 543; *Howard v. First Nat. Bank*, 44 Kan. 549. A recovery in an action of ejectment, in which a claim for waste committed by cutting timber is made, is no bar to a subsequent action of trover for the conversion of cord-wood into which the timber was cut by the defendant in ejectment after it was severed from the realty: *Mauldin v. Clark*, 79 Cal. 51.

HARTFORD IRON MINING COMPANY v. CAMBRIA MINING COMPANY.

[93 MICHIGAN, 90.]

LESSEE OF MINING LAND MAY MAINTAIN TROVER FOR CONVERSION OF UNMINED ORE, WHEN. — Where a lessee has possession of land under a mining lease which gives him the exclusive right, during a certain number of years, to mine ore therein, requires him to mine not less than a specified number of tons of ore each year, and as much more as can be reasonably mined, and to pay a royalty on such specified number of tons every year, whether mined or not, and, in case he does not mine that number of tons in any one year, credits the excess of royalty paid for that year on any excess of ore mined in any succeeding year, he has such a property in the unmined ore in the land as will enable him to maintain trover for its wrongful conversion.

TROVER LIES FOR ORE MINED BY PARTY IN POSSESSION UNDER CLAIM OF RIGHT, WHEN. — A lessee of mining land may maintain an action of trover against a person who was in the actual possession under a claim of right, for the wrongful conversion by the latter of unmined ore in the land, where the only possession he had was such as enabled him to mine and convert the ore, and his claim of title was afterwards decided against him.

MEASURE OF DAMAGES IN TROVER FOR CONVERSION OF UNMINED ORE. — In an action of trover by a lessee of mining land against a party for the wrongful conversion of unmined ore in the land, a rule of damages which allows the plaintiff to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by the defendant to the lessor, is sufficiently favorable to the defendant.

A. B. Eldredge and Ball and Hanscom, for the appellant.

F. O. Clark, for the plaintiff.

MONTGOMERY, J. This is an action of trover to recover the value of iron ore. The plaintiff recovered, and the defendant brings error. The case has once before been considered by this court, and is reported in 80 Mich. 491.

The land leased to plaintiff comprised the east half of lot 5,

and lots 6 and 7, in section 36, township 48 north, range 27 west. The defendant was the lessee of the west half of lot 5, and the question chiefly considered on the former appeal was whether the true dividing line was one leaving an equal acreage on either side thereof, or one equidistant from the east and west corners. This question was ruled in accordance with the contention of plaintiff, namely, that each party was entitled to occupy one half in quantity. The defendant acquiesces in this ruling, but it alleges errors in other rulings of the court.

It is first contended that plaintiff has no title which entitles it to maintain trover, even if the defendant be held to be a wrong-doer. The rights of plaintiff in the ore are defined by a lease, or license, containing terms and provisions as follows:—

“The party of the first part, for and in consideration of the rents, royalty, covenants, and agreements hereinafter mentioned and stated, on the part of the said party of the second part to be paid, observed, and performed, has licensed, and by these presents does license, the party of the second part to enter upon the following described tracts or parcels of land, . . . with the right to mine, ship, dig, and carry away therefrom such iron ore as may exist or be discovered thereon, for the term of twelve years from and after the first day of June, A. D. 1887, . . . subject to the conditions, covenants, limitations, and agreements hereinafter made, as follows: Said second party shall have the exclusive right to mine iron ore on said lands, and ship and carry away the same, during the term aforesaid. The party of the second part shall not cut or use any timber growing on said lands, without the consent, in writing, of the party of the first part; but it may erect such houses and machinery as may be necessary to conduct its mining operations on said land. The right of possession of said lands not occupied by said second party for mining purposes shall always remain in the said first party, its successors and assigns, who shall have the same right to use and occupy such land as though these presents were not executed, whenever the same does not manifestly or evidently interfere with the mining operations of said second party. Said second party shall pay a royalty of fifty cents to said first party, its successors and assigns, on each and every gross ton of iron ore mined on said land during the term, and shall diligently and constantly prosecute the mining operations during said

term. . . . Said second party shall mine not less than seven thousand gross tons each year during said term, and so much more as can be reasonably mined on said land; and said second party shall pay a royalty on at least seven thousand gross tons of iron ore each year, payable monthly, *pro rata*, during the shipping season, no matter whether mined or not. In case said second party does not mine seven thousand gross tons of iron ore in any one year, and pays royalty as aforesaid, it shall be credited for the royalty so paid on ore mined on the excess mined over seven thousand tons in any succeeding year. . . . Said second party shall, in due season, pay, or cause to be paid, all taxes and assessments, general and special, ordinary and extraordinary, that may be assessed or levied on said land or premises, . . . and at the expiration of said term of twelve years the said second party will peaceably and quietly leave, surrender, and yield up the possession of said lands to said first party, its successors or assigns."

The instrument contains a further provision for re-entry in case of failure to perform on the part of the second party, and a covenant that, "After the fulfillment of the covenants and conditions of this lease by the party of the second part, and on the expiration of this lease, he may remove from the said premises all houses erected by him on the land, or machinery put upon the same."

The defendant's contention is that the plaintiff is, under this instrument, a mere licensee, and that a licensee who is privileged by his license to mine ore has no such beneficial interest or title in the ore before it is severed from the realty as to entitle him to bring trover against one who enters upon the land, and mines it without his permission. Defendant's counsel cite, as sustaining this proposition, *Grubb v. Bayard*, 2 Wall. Jr. 81; *Brandt v. McKeever*, 18 Pa. St. 70; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Baker v. Hart*, 123 N. Y. 470; *Gillerson v. Mansur*, 45 Me. 25.

In *Grubb v. Bayard*, 2 Wall. Jr. 81, it was held that under the general terms of the license in question the licensee was privileged to enter upon lands and mine the ore or not, as he saw fit. The words employed were, "Full and free liberty to dig all metals and minerals throughout the demised lands." It was held that this language did not exclude the owner of the soil from mining, and that therefore no title vested in the licensee in the ore until actually mined.

In *Brandt v. McKeever*, 18 Pa. St. 70, it was held that a

statute which gave the right to dig and mine for iron, coal, limestone, sand and gravel, fire-clay, and other minerals, did not grant a right to the soil, but a right to mine and dig in it, and to take to the use of the warrantee the product of his digging and mining, and everything he should have made his own by the impress of his labor, but nothing else; that a grant of the right to dig and mine conveys no more than a license to take and appropriate the minerals beneath the soil, but vests no property in them until they are taken and appropriated; that under the statute in question the plaintiff had no better right than had the defendant to the sand deposited, or, rather, that the right to it was exclusively in the state.

In *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248, it was said: "A license may confer either a sole or exclusive right, or simply a right in common. If it simply confers a right to dig or take ore or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so; and when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate or property in the land is passed, the licensee acquires no title to the ore until he has severed it"; and it was said, as to the defendant's right in that case: "His license was unexecuted; he obtained it without paying a consideration for it, and had done nothing under it which rendered its revocation, either as a matter of law or conscience, unfair or unjust. If his license invested him with no estate or interest in the lands, and no equities have been raised in his favor by the expenditure of money or labor under it, it is difficult to understand by force of what legal or equitable rule it can be said to possess the least efficacy after the person who granted it has ceased to have any interest in or dominion over the lands upon which it was intended to operate."

In *Baker v. Hart*, 123 N. Y. 470, it was held that the plaintiffs, under a grant to them of the sole and exclusive right of entering in and upon the lands for the purpose of "quarrying, cutting, crushing, and removing stone for the term of ten years, but not to hold possession of any part of said lands for any other purposes," acquired no such right in the unquarried stone as entitled them to maintain trover against a wrongdoer. It was said in that case, however, that "a right to take all the stone on the land without restriction in time or quantity might readily be held to transfer its ownership," and that

under the facts in the case under consideration undoubtedly the act of defendants was an infringement of their rights, for which they could recover such damages as they in fact sustained.

The case of *Gillerson v. Mansur*, 45 Me. 25, is not in point. Plaintiff in that case rested his claim of title upon the permit to take the timber which defendants had appropriated within a specified time and not after, and upon certain conditions. The timber had not been cut by the plaintiff, and by the terms of the permit the original owner was to have the original and complete ownership and control of all timber to be cut upon the land, and it was further stated as a fact that it did not appear that the conditions by which the timber could be cut were ever fulfilled in any respect; and it was said: "Nothing is exhibited in the case that Gilman had not the title and right of possession exclusively to the property replevied, and the issue that the plaintiff had no right of possession therein must have been for the defendants on the evidence introduced."

The cases above referred to which bear upon the question of license sustain the proposition that a naked licensee who has not reduced the property to possession has not such a right in the property as enables him to maintain trover, but we think the present case is clearly distinguishable from those referred to. It further appeared, in the present case, that the plaintiff was actually given possession for the purposes of mining. It was, by the terms of its lease, granted the exclusive right to mine during the period of twelve years; and furthermore, was required by the terms of its contract to mine not less than seven thousand tons per year, and to pay for so much, whether mined or not, and also was required to mine so much more as could be reasonably mined on such land. In such a case, it is a contradiction of terms to say that one who has a right to mine ore, and who is bound to take out a given amount of ore in a stated time, and who is likewise bound to pay for it, whether mined or not, and who is entitled to possession for that purpose, and who has taken possession for that purpose, has no property in the ore which is actually mined by a wrong-doer. If it be held that he has not, it must be because he has no interest in the ore that lies in the ground. But he has an interest; he has obligated himself that this ore, to the extent at least of seven thousand tons per year, and so much more as can be reasonably mined, shall be taken out of

the ground, and that he shall pay to the licensor a royalty upon that amount of ore, whether mined or not, and if not mined he has an interest to the extent of the royalty in the unmined ore, and receives credit for that the following year. This right to mine during the twelve years is irrevocable, and no ore could be taken out without damaging the plaintiff to the extent of the difference between the value of the ore and the cost of production. The language of the lease does not leave it doubtful whether the right is exclusive of the lessor. The rights reserved to the lessor are only such as shall not interfere with the possession of the lands by the plaintiff. Neither the lessor nor a wrong-doer had the right to enter upon the lands for the purpose of mining. We think the circuit judge was right in holding that under these circumstances the plaintiff had such title to this ore as entitled it to maintain this action.

But it is contended that during the time that the main part of the ore in question was taken out, the defendant was in the actual possession of the land under a claim of right, and that trover cannot, therefore, be maintained; but the only possession of this particular strip in question which defendant had was such as enabled it to mine and convert the property in question. We think that, under the circumstances, trover will lie: *Busch v. Nester*, 70 Mich. 525.

It is also contended that plaintiff was estopped from maintaining this action by the acts of its officers, but a careful examination of the record satisfies us that the question is not materially different from that presented on the former hearing, when this question was determined adversely to the contention of the defendant.

The rule of damages adopted was sufficiently favorable to the defendant. The plaintiff was allowed to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by defendant to the owner. It was competent to show by the witness Metheral what it would cost per ton to mine the ore. He had shown himself competent to express an opinion upon this subject.

We have considered the other points presented by the record, but discover no error, and the judgment will be affirmed, with costs.

MORSE, C. J. McGRATH and LONG, JJ., concurred.

GRANT, J., took no part in the decision, for the reason that he was the circuit judge before whom the case was first tried.

TROVER, WHEN MAINTAINABLE. — Trover for iron ore may be maintained by one in possession of the land from which it was taken, who has dug the same under a conveyance of the right by the owner of the land, against a person taking and converting such ore after it is dug: *Grubb v. Guilford*, 4 Watts. 223; 28 Am. Dec. 700: See also note to *Wilson v. Hoffmann*, 93 Mich. 72, *ante*, p. 485.

CONTINENTAL INSURANCE COMPANY v. THE H. M. LOUD & SONS LUMBER COMPANY.

[93 MICHIGAN, 139.]

MERGER — CAUSE OF ACTION CANNOT BE SPLIT UP AND RECOVERY HAD ON PORTION ONLY OF CLAIM. — A party seeking to enforce a claim must present all the grounds upon which he expects a judgment, and cannot split up his demand or prosecute it piecemeal. Where, therefore, an insurance company pays to the insured a portion of the loss sustained by him through the alleged negligence of a third person, and is subrogated to a proportionate amount of the claim of the insured against such third person, the company cannot maintain an action for the recovery of the portion of the claim covered by the subrogation.

M. J. Connine, for the appellant.

C. R. Henry, for the plaintiff.

LONG, J. October 29, 1889, the plaintiff issued to Rix Brothers, a grocery firm doing business in Oscoda village, its policy of insurance in the sum of one thousand dollars. The goods insured were contained in a two-story frame warehouse, located back of the firm's general store, and near the railroad operated and used by the defendant in this suit. January 30, 1890, a fire occurred by which the property so insured was destroyed, and the plaintiff paid Rix Brothers on the policy for such loss the sum of \$866.20, and took from them the following assignment: —

"SUBROGATION.

"Be it known that the Continental Insurance Company of New York did insure Rix Brothers, under its policy No. 311, Oscoda, Michigan, as follows: One thousand dollars on their stock of groceries and provisions, flour, feed, and hay, all while contained in the two-story frame warehouse of the Oscoda Boom Company, situated on block 19, village of Oscoda, Michigan.

"Further, that on the thirtieth day of January, 1890, a fire occurred by which property so insured was damaged or destroyed to the amount of \$2,698.62.

"Now, therefore, we, Rix Brothers, in consideration of \$866.20 to me in hand paid by the said Continental Insurance Company of New York, in full settlement of claim against said company by reason of such insurance and loss, do hereby assign, set over, transfer, and subrogate to the said Continental Insurance Company of New York all the right, claims, interest, choses, or things in action, to the extent of \$866.20 paid me as aforesaid, which I may have against the said H. M. Loud & Sons Lumber Company, or any other party, person, or corporation who may be liable, or hereafter adjudged liable, for the burning or destruction of said property; and I hereby authorize and empower the said Continental Insurance Company of New York to sue, compromise, or settle, in my name or otherwise, to the extent of the money paid as aforesaid; and the said insurance company is hereby substituted in my stead, and subrogated to all my rights in the premises, it being expressly stipulated that any action taken by said company shall be without charge or cost to me.

"RIX BROTHERS,

"Per V. E. RIX.

"Witness: LILLIE WATERS."

This action is brought to recover from the defendant the moneys paid by the plaintiff to Rix Brothers for their loss, the claim being that the fire was occasioned by the use of a locomotive run and operated on defendant's railroad. To the declaration filed defendant pleaded the general issue. The case was tried in the circuit court for Iosco County before a jury, where plaintiff had verdict and judgment for the amount of money paid Rix Brothers.

It appears by the testimony in the case that the loss of Rix Brothers by this fire was the sum of \$2,698.62; and the claim on the trial was that the defendant, by the improper construction of its engine and the careless and negligent manner in which it was used, caused sparks to be emitted which destroyed Rix Brothers' property. It is also apparent, as shown by the record, that other insurance companies aside from the plaintiff had issued policies to Rix Brothers, insuring in different amounts the property destroyed by this fire. The paper subrogating the plaintiff to all of the rights of Rix Brothers against the defendant does not purport to assign and transfer to the plaintiff all of the claim and demand of Rix Brothers against the defendant for the loss sustained by them by this fire but only an interest in the claim and demand against,

the defendant, represented by the sum of \$866.20, and by the terms of subrogation the plaintiff is authorized and empowered to sue for the recovery of the damage occasioned by the fire only to the extent of that sum.

It is a well-settled rule that an entire claim or demand arising out of a single transaction, whether in the nature of a contract or tort, cannot be divided into separate and distinct claims, and the same form of action brought for each, or two suits maintained, without defendant's consent: *Herri-ter v. Porter*, 23 Cal. 385; *Logan v. Caffrey*, 30 Pa. St. 196; *Colvin v. Corwin*, 15 Wend. 557; *Alcott v. Hugus*, 105 Pa. St. 350; *Smith v. Jones*, 15 Johns. 229; *Hartford Fire Ins. Co. v. Davenport* 37 Mich. 614.

A party cannot be permitted, even in a tort, to split up a cause of action and bring separate actions for a part of the claim, or several actions where one action would suffice. One seeking to enforce a claim must present by the pleadings or proof, or both, all the grounds upon which he expects a judgment. He may not split up his demand, or prosecute it piecemeal, or present only a portion of the grounds upon which relief is sought, and leave the rest for a second suit if the first fails. Otherwise there would be no end to litigation. This rule is settled in *James v. Allen Co.*, 44 Ohio St. 230, 58 Am. Rep. 821, and cases there cited.

Under the pleadings and proofs in the case, the court should have directed the verdict in favor of the defendant, for the reason that it was made apparent to the court upon the trial that an effort was being made to collect upon a split cause of action, and which was a portion only of the claim.

If the Rix Brothers have a claim, undoubtedly they would have a right to maintain a suit for the loss occasioned by the negligence of the defendant in setting the fire, if the defendant was negligent in that respect, and the Rix Brothers could undoubtedly assign their claim and demand, and their assignee would be subrogated to their rights, having the same rights of recovery, and no greater; but the Rix Brothers or their assignee, or person subrogated to only a portion of the claim, could not bring the action to recover such portion, and leave out of the suit or action a portion of such claim or demand.

The judgment of the court below must be reversed, with costs of both courts. No new trial will be ordered.

ACTIONS, SPLITTING OR SEVERANCE OF. — Plaintiff cannot split up a single cause of action into two or more suits: *Nightingale v. Scannell*, 6 Cal. 506; 65 Am. Dec. 525; *Oliver v. Holt*, 11 Ala. 574; 46 Am. Dec. 228; *Bendernagle v. Cocks*, 19 Wend. 207; 32 Am. Dec. 448; *Gaurnsey v. Carver*, 8 Wend. 492; 24 Am. Dec. 60; *Stevens v. Lockwood*, 13 Wend. 644; 28 Am. Dec. 492; *Liddell v. Chichester*, 84 Ala. 508; 5 Am. St. Rep. 387; *Thompson v. McDonald*, 84 Ga. 5; *Roby v. Elyers*, 130 Ind. 415; *McNeil v. Johnson*, 109 N. C. 571.

HALL v. NIAGARA FIRE INSURANCE COMPANY.

[93 MICHIGAN, 184.]

INSURABLE INTEREST IN BUILDING ON LAND HELD UNDER CONTRACT OF PURCHASE. — One who holds land under a contract of purchase has an insurable interest in a building which he is erecting thereon.

INSURANCE, APPLICANT FOR NOT REQUIRED TO SHOW HIS TITLE UNLESS REQUESTED. — An applicant for insurance is not required to show the exact condition of his title to the property sought to be insured, unless he is requested so to do; and if his application is oral and no deceit is practiced, his failure to mention encumbrances, where no inquiry is made concerning encumbrances, is immaterial.

EQUITABLE OWNERSHIP SUPPORTS RECITAL OF OWNERSHIP IN APPLICATION FOR INSURANCE — CONDITION IN INSURANCE POLICY AS TO OWNERSHIP OF PROPERTY, HOW CONSTRUED. — A condition in a policy of insurance that the policy shall be void unless consent in writing is indorsed thereon by the company, if the assured is not the sole and unconditional owner of the property, relates only to changes arising after the execution and acceptance of the policy, and does not apply to an existing state or condition of the property at the time when the policy was issued.

CONSENT TO ASSIGNMENT OF POLICY OF INSURANCE, COMPANY BOUND BY. When an insurance company, without reservation, consents to the assignment of an insurance policy, representing upon its face an unearned value, to a purchaser of the insured property, who in good faith pays value for such assignment, the company cannot be allowed to set up mental reservations or prior breaches which were unknown to either party, in avoidance of its liability on the policy.

CONDITION IN INSURANCE POLICY AS TO LITIGATION CONCERNING PROPERTY, CONSTRUCTION OF. — A provision in a policy of insurance that it shall become void if the title or possession of the property insured be involved in litigation, relates to a litigation over the title or possession of the assured, and not to a proceeding instituted to oust a tenant from the property.

Keena and Lightner, for the appellant.

Hanchett, Stark, and Hanchett, for the defendant.

MCGRATH, J. This is an action upon a policy of insurance dated October 13, 1888, and running for three years, issued to J. C. Hough "on his two-story frame dwelling, . . . against all such immediate loss or damage sustained by the assured

as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property." By the terms of the policy, the assured by its acceptance, "Warrants that any application, survey, plan, statement, or description, connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company any information material to the risk." The policy also provided that, "This policy shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances, viz.: If the assured is not the sole and unconditional owner of the property; or if any building intended to be insured stand on ground not owned in fee-simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, location, or possession of the property (except in case of succession by reason of the death of the assured), whether by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree; or if the title or possession be now or hereafter become involved in litigation; or if this policy be assigned or transferred before a loss." No written application for the policy was requested or made. The insurance was solicited by the company's agent, "who saw the building permit in the paper, and came to the office [Hough's], and wanted to write a policy on the house." No statement as to the condition of the title or as to the nature of Hough's ownership was asked for or given. Hough, in November, 1887, had bought ten acres of land for eighteen thousand dollars, a large portion of which had been paid, and had subdivided the land; the house in question being, at the time the insurance was effected, in process of construction on one of the lots known as "Lot 7." He held the whole under a contract of purchase. October 13, 1888, the policy was issued. May 14, 1889, Hough contracted, in writing, to sell to one Stevens this lot seven for three thousand five hundred dollars, which was to be paid as follows: twenty-five dollars on or before July 1, 1889, and the further sum of twenty-five dollars in monthly payments thereafter, until the entire sum, with interest, should be paid. Stevens contracted to pay all taxes and assessments upon the property, and to pay the expenses of keeping the buildings insured against

loss or damage by fire. Hough agreed, on performance of all of the covenants upon Stevens's part, to execute a good and sufficient deed to Stevens. It was further agreed that, "The said party of the second part shall have possession of said premises on and after the date hereof, while he shall not be in default on his part in carrying out the terms hereof; . . . and if said party of the second part shall fail to perform his agreements on this contract, or any part of the same, the said party of the first part shall, immediately after such failure, have a right to declare the same void, and may retain whatever may have been paid hereon, and all improvements that may have been made on said premises, to the extent of his just interest therein, and treat the party of the second part as his tenant holding over without permission."

Stevens went into possession at once, and occupied the premises at the date of the fire, although he only made three monthly payments. On July 2, 1890, he was given notice to quit the premises, and that the contract had been declared void. In March, 1890, Hough assigned all his interest in the original contract held by him to plaintiff. At the time of that assignment, Hough assigned the policy to Hall, and Hough and Hall went together to the office of defendant's agent. Hall told the agent that Hough had "assigned his interest in the property" to him (Hall), and that he "wanted the policy to read payable to him in case it should burn," and thereupon the consent of the company was indorsed upon the policy.

Upon these facts the court directed a verdict for defendant, and plaintiff appeals.

The record presents two questions: 1. Was this contract valid at its inception? 2. Conceding that the policy was vitiated by the Stevens contract as to Hough, what was the effect of the company's consent to the assignment to plaintiff?

It must be conceded that Hough, at the inception of the policy, had an insurable interest in the property. It is well settled in this state at least that an applicant for insurance is not required to show the exact condition of his title, unless requested so to do: *Castner v. Farmers' etc. Ins. Co.*, 46 Mich. 15; *Guest v. New Hampshire etc. Ins. Co.*, 66 Mich. 98; that the failure to mention encumbrances, if not inquired about, the application being oral, and no deceit being practiced, is immaterial: *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Tiefenthal v. Citizens etc. Ins. Co.*, 53 Mich. 306; and that an equitable owner-

ship will support a recital of ownership: *Farmers' etc. Ins. Co. v. Fogelman*, 35 Mich. 481; *Guest v. New Hampshire etc. Ins. Co.*, 66 Mich. 98. See 1 May on Insurance, secs. 285-287, and 7 Am. & Eng. Ency. of Law, 1020.

In the present case, neither Hough nor Hall was asked to state the nature of his interest in the property or the condition of the title; neither made any misrepresentation or was guilty of any fraud or concealment; and Hough at the inception of the policy, and plaintiff at the time of the consent of the company to the assignment to him, had such an interest in the property insured as would support the recitation in the policy that it covered "his two-story frame dwelling." Hough's contract with Stevens was not executed until after the policy had been issued, and when Hall took Stevens was in default; but in any event Hall had at that time an equitable interest.

The provisions of the policy in the present case respecting the sole and unconditional ownership of the property, the truthfulness of the statement as to the interest of the assured in the property, and as to any change in the title, interest, location, or possession of the property by sale or transfer, are precisely the same as were passed upon in *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, and the court there held that all the provisions of the contract must be taken together; that if the insurer desired to know the interest it was insuring, it should have defined that interest in the policy; that it was the intention of the parties to make a binding contract of insurance when accepted by the assured; that the claim as to sole and unconditional ownership could only be held to relate to changes arising after the execution and acceptance of the policy, and did not apply to an existing state or condition of the property at the time that the policy was issued. That case, therefore, disposes of the first question.

The other question is the more serious one, and one upon which the authorities are by no means uniform.

In *Continental Ins. Co. v. Munns*, 120 Ind. 30, the assured had mortgaged the property, and afterwards sold it to Munns and assigned the policy, to which assignment the company, without knowledge or notice of the mortgage, consented. The court held, —

That a contract of insurance is purely a personal engagement, and does not run with the property insured, citing *Nordyke and Marmon Co. v. Gery*, 112 Ind. 535; 2 Am. St. Rep. 219; and *Cummings v. Cheshire Co. etc. Ins. Co.*, 55 N. H.

457: "that the policy expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed. . . . The contract of insurance, thus consummated, arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default." That being a new and independent contract, both parties are subject to the same rules which govern the making of the original contract.

A large number of authorities are cited in support of the conclusions reached. In *Steen v. Niagara etc. Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297, the court held that the consent to the assignment created a new contract between the company and the assignee, unaffected by the forfeiture if in any event it could have been insisted upon.

In *Shearman v. Niagara etc. Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380, the property was conveyed to plaintiff March 4th. The policy was renewed in the name of the grantor March 21st, and was assigned to plaintiff April 15th, and on the same day the company consented to the assignment. The company insisted that at the time of its consent it had no knowledge of any fact except that at that time it was notified that the property had been conveyed to plaintiff, but the time of the transfer had not been given, nor the fact that the policy was issued after the transfer. The court held that, "The renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose if it had not expired; that the consent to the assignment was equivalent to an agreement to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on the renewal was a good consideration."

In *Hooper v. Hudson River etc. Ins. Co.*, 17 N. Y. 424, the insurance was upon a stock of goods which had been sold on execution, and the purchaser obtained the consent of the company to an assignment to him, and the court held that the

policy became a new contract of insurance between the underwriters and the assignee.

"An assignment, therefore, being of no avail, except in case of an interest in the assignee in the subject insured, the request made to the defendants to consent to an assignment to plaintiff was of itself notice to them that he had acquired or was about to acquire an interest in the insured property. If, therefore, it was important to the defendants to know what the nature of the interest was which the plaintiff had acquired, they should have asked for information in respect to it. If they were content to give their consent without such inquiry, it was their own fault."

In *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, it was held that, "Although the assured may have made statements in his application which by the terms of the policy would defeat a recovery thereon by him, yet where the insured property is sold and the policy assigned to another, and the company assents to such assignment, a new contract arises, which is not affected by the fraud of the party originally insured."

In *Ellis v. State Ins. Co.*, 68 Iowa, 578, 56 Am. Rep. 865, a majority of the court held that the provision in the policy that, "if the title of the property is encumbered, the policy shall be void," was imported into the new contract, and that the existence of the mortgage invalidated that contract. The court divided upon the construction of this provision, a minority of the court holding that it was not against prior or existing encumbrances, but against those which should fall on the property subsequent to the execution and delivery of the new contract. Upon this question the dissenting opinion is in accord with the case of *Hoose v. Prescott Ins. Co.*, 84 Mich. 309.

In *Ellis v. Insurance Co.*, 32 Fed. Rep. 646, there is a very able discussion of the question by Brewer, J., who says: "Where an assignment goes with an absolute sale of the property, there is the creation of a new contract. If it is a new contract for one purpose, it is a new contract for all purposes. The assignment is expressed to be subject to the terms and conditions of the policy. What does that mean? It is equivalent to saying that the assignee takes the contract as of present writing, containing the same terms and stipulations, binding him to the same duties, and subjecting him to the same liabilities that were imposed by the contract in the first instance upon the assignor. In no other way can it fairly be

said that a new contract was made. Tested by that rule, the assignee agreed, as the assignor had agreed in the first instance, that he would place no encumbrance upon the property, and that if he did the policy should fail. There is no pretense that he has violated that stipulation thus construed. It may well be doubted whether the use of the technical terms 'assignment,' 'assignor,' and 'assignee' are apt to describe the actual transaction. When the insured sells the property, that moment the policy falls. He has no insurable interest. The policy ceases to have legal force as a policy. Can it be said he is assigning that which is nothing, and that the insurance company contemplates and assents to the transfer of that which has no legal existence? This is a practical question, and we must look at these matters in a practical light. When the purchaser buys the property, naturally the thought in his mind is insurance. It being his, and the old policy being dead, he looks for insurance. He finds a policy which had been in force, dead because of his purchase and cessation of the insurable interest in the assignor, yet which the insurance company is willing to have transferred to him. Would it not be an injustice to him if, after the insurance company has consented to that transfer, it could turn back to acts done by the person from whom he obtained the policy, and claim that those acts vitiated the whole thing, and rendered it not liable to the assignee?

"But it is said there is really no consideration for this contract on the part of the company. . . . The assignment of this policy is an assertion, practically, by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that there would be the injury to the assignee as well as the benefit to the insurer to be considered.

"Again, it is said that there can be no waiver without knowledge; that the insurance company was ignorant of the fact of this encumbrance; and therefore it should not be held to have waived its rights. There may be estoppel without knowledge. . . . This consent to the assignment, dealing with things in a practical way, must be construed as a state-

ment by the insurance company that it recognized that policy as a valid instrument. Surely it would be unjust to think that the insurance company put itself into the position of assenting to the transfer of a policy which had no validity, going through the form of consenting to that which had no legal existence, and was worthless.

"These considerations, although we concede that the question is one of not perfect transparency, lead us to the conclusion that this assignment must be taken, in the language of the text-books and the authorities, to create a new contract between the assignee and the insurance company, — a new contract embracing, as of present writing, the same terms and stipulations as were embraced in the contract originally written between the assignor and insurer": 2 May on Insurance, sec. 378; Wood on Insurance, secs. 110, 366; Flanders on Fire Insurance, 484; *Cummings v. Cheshire Co. etc. Ins. Co.*, 55 N. H. 457; *Wilson v. Hill*, 3 Met. 66; *Flanagan v. Camden etc. Ins. Co.*, 25 N. J. L. 506; *Pratt v. New York etc. Ins. Co.*, 64 Barb. 589; 55 N. Y. 505; 14 Am. Rep. 304.

An insurance policy is a personal contract of indemnity. It is non-assignable, except with the assent of the insurer; nevertheless, the assignment of policies of insurance is an incident of nearly every transfer of personal property or improved real estate. Unexpired policies, before loss, have, as a rule, in the hands of the person to whom issued or his assignee, a certain face value, which is the unearned premium or indemnity to the assignee for the unexpired term. They are either transferred as a part of the consideration for the purchase-money, or the value of the unearned premium is agreed to be paid in consideration of the assignment. The assignee acquires the right to the unearned premium, or the right to the indemnity for the unexpired term, for value. The right to the unearned premium may be subject to the conditions of the contract, for he takes that right subject to the consent of the company; but suppose that the unearned premium is paid over to the assignee of the policy, or credited upon the premium for a new policy, could it be contended that the company would have the right to recover back the sum so paid or credited from the assignee? The company, in such case, recognizes the validity of the policy, and the assignee is simply reimbursed for what he has paid to the assignor.

The ordinary railroad mileage ticket is not transferable, and attached is a condition that its use by any other person will

operate as a forfeiture. Suppose that A holds such a ticket, which he desires to transfer to B, and they go together to the office of the railroad company, and A transfers the ticket to B, and the company indorses its consent, B paying the value represented by the unused strip for the transfer. Could the railroad company be afterwards heard to say, as against B, that A had, before the transfer, forfeited the contract, even though it had no knowledge of the breach, and therefore the contract was void as to B? Certainly not. By consent, a new contract between the company and B is created. The company has agreed with B that the unused coupons are good in his hands. The company cannot be said to have waived that which it had no knowledge of, but it has waived the right as against B to insist upon A's infirmities, whatever they may have been. The contract which, prior to the transfer, was personal with A has ceased, and has become personal with B. B does not agree that A has not violated its provisions, but only that he will not. Insurance contracts are peculiar, and hence rules applicable to other contracts are applicable to them only so far as the provisions are analogous.

When a party to a non-assignable instrument, representing upon its face an unearned value, consents to its transfer without reservation, and the assignee in good faith pays value for such transfer, the party consenting cannot be heard to set up mental reservations or prior breaches which were unknown to either party. The rule applicable to the transfer of an assignable contract has no application to such contracts. The consent to the assignment imported validity. The right to withhold or grant it is for the benefit of the insurer. It has its burdens as well as its advantages. The application for consent is, in effect, one for a contract of indemnity to the assignee. It affords an opportunity to the company to examine the risk, or to inquire as to the title or interest to be insured, or as to whether there had been any other change in risk or title. Had defendant done so, and refused its consent, plaintiff would have been in a position to retain or recover the consideration paid, and to seek indemnity elsewhere. It is too late now, after the loss, to set up the changed conditions.

It may be said, too, that at the time of the application for the consent of the company to the assignment, plaintiff informed the company that Hough had assigned his interest in the property to him. That was sufficient, of itself, to put the company upon inquiry.

Defendant insists, further, that inasmuch as plaintiff had commenced proceedings against Stevens before a circuit court commissioner to recover possession of the premises, the policy was invalidated thereby. The policy contained a provision that, "if the title or possession be now or hereafter become involved in litigation," the policy should become void. Stevens was clearly in default, having occupied the premises for twelve months, and paid but seventy-five dollars, whereas he had agreed to pay twenty-five dollars per month. Plaintiff had declared the contract under which Stevens occupied void, as he had the right to do under the contract. From that moment Stevens became and was a tenant holding over without permission. The proceeding to recover possession was predicated upon these provisions of the contract. It cannot be contended that the provision of the policy referred to contemplated that, in the event that proceedings were instituted to oust a tenant, the policy should become void. This provision, taken in connection with the other provisions of the policy, clearly relates to a litigation over the title or possession of the assured.

The judgment must be reversed, and a new trial had, with costs of this court to the plaintiff.

The other justices concurred.

INSURABLE INTEREST. — A purchaser of land under articles of agreement has an insurable interest in buildings on the land, though the purchase-money is unpaid: *Imperial etc. Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686, and note; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 355; 30 Am. Dec. 90; *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582; *Franklin etc. Ins. Co. v. Martin*, 41 N. J. L. 568; 29 Am. Rep. 271.

EQUITABLE TITLE GIVES AN INSURABLE INTEREST: *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; 20 Am. Dec. 507; *Hough v. City etc. Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581; *Gilman v. Dwelling-house Ins. Co.*, 81 Me. 488.

INSURANCE — DESCRIPTION OF THE TITLE OR INTEREST OF THE ASSURED. Failure of the assured to disclose the nature and extent of his interest in the property insured will not avoid the policy in the absence of fraud: *Morrison v. Tennessee etc. Ins. Co.*, 18 Mo. 262; 59 Am. Dec. 299; *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7; 21 Am. St. Rep. 716; *Cross v. National etc. Ins. Co.*, 132 N. Y. 133.

INSURANCE — ASSIGNMENT OF POLICY — RIGHTS OF ASSIGNEE. — A policy of fire insurance is a personal contract with the assured and does not pass to a purchaser unless assigned with the assent of the insurer: *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 355; 30 Am. Dec. 90; but the assignee does not acquire the full rights of an assignee of a chose in action, but recovers in the right of the parties insured and not in his own, and is affected by the subsequent acts of the insured: *Hale v. Mechanics' etc. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis. 378; 84 Am. Dec. 754. Thus where a policy was void in the hands of the assured by reason of misrepres-

sentations, it will be equally void in the hands of the assignee, although the company assents to the assignment: *Citizens' Ins. etc. Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; and where a policy has been rendered voidable by the encumbrance of the property, and the company, without knowledge of the encumbrance, consents to an assignment, the assignee cannot recover: *Ellis v. State Ins. Co.*, 68 Iowa, 578; 56 Am. Rep. 865. The approval of an assignment by the company's agent and a subsequent acquiescence of the company in the agents' act will be deemed a waiver of the forfeiture of the policy which the assignment would otherwise have entailed and the operative force of the policy will revive in the hands of the assignee: *Imperial etc. Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686.

PALMER v. MICHIGAN CENTRAL R. R. Co.

[93 MICHIGAN, 363.]

SERVANT VICE-PRINCIPAL OF MASTER, WHEN. — Where an assistant road-master of a railroad company has the exclusive and unconditional control of all the men engaged upon a certain work at the time of an accident, with absolute power to employ and discharge them, and to issue to them orders which they are bound to receive and obey, and has full management and control of the work, with power to prescribe the method of its performance, his acts are the acts of the company, and his negligence is the negligence of the company, for which it is legally responsible. A narrow or technical construction of the rule of *respondent superior* is not in harmony with recent Michigan decisions.

POWER TO EMPLOY AND DISCHARGE OTHER SERVANTS, QUESTION AS TO — IMPORTANT, WHEN. — The question whether or not a servant has power to employ and discharge other servants is important in determining whether or not he is to be deemed a superior servant, for whose acts the master is held liable, although it is not necessary to show it by positive proof in every case.

NEGLECT PER SE, WHAT IS. — To require a gang of sixteen men to range themselves in a line along a train of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passes them heavy steel rails, and then to run fast enough along the uneven ground, usually observed along the side of a railroad track, to be able to have the next rail in position to throw on the car of the moving train at the proper moment as it passes, at least without notifying a new and inexperienced man of the great hazard attending the performance of such work, is negligence *per se*.

EVIDENCE, ADMISSION OF, NOT PREJUDICIAL, WHEN. — Where the declaration in an action for negligence claims damages for an injury to the plaintiff's leg, it is not prejudicial error for the court to permit the plaintiff to be asked if there is anything on his hip which indicates the force of the blow, when, upon objection being raised, his counsel states that the testimony is offered to show the force of the blow, and that he wants the court to instruct the jury that they cannot give any damages for an injury to the hip.

EVIDENCE THAT CASE IS BEING PROSECUTED ON PERCENTAGE NOT ADMISSIBLE. — It is not error for the trial court to exclude testimony to show

whether or not the plaintiff's attorney in an action for negligence has taken the case to prosecute on a percentage, and whether or not he is bearing the expenses of the litigation.

Edwards and Stewart, Ashley Pond, and Henry Russell, for the appellant.

Howell and Carr, for the plaintiff.

DURAND, J. This cause has been in this court once before, and is reported in 87 Mich. 281. The record in that case, upon most of the important questions raised, was substantially the same as this, and the principal facts upon which the plaintiff has based his suit were, of course, the same. We will therefore only restate generally such portions of the facts as are necessary for a proper consideration of the questions now presented.

On September 10, 1889, Patrick Cavanaugh, who had been in the employ of the defendant as a section-foreman for nineteen years, and who had charge of a section from Dowagiac to a point three and three-quarters miles east, caused the employment of the plaintiff as a regular section-hand. On the eleventh day of September, 1889, and being the second day of plaintiff's employment, the gang of men in which plaintiff was working, together with other men in the employ of the defendant, including the section-foreman, were put to work loading rails on a moving train of flat cars, operated by defendant, under the direction of Patrick Wahl, an assistant road-master of the defendant railroad, and which position he had held for upwards of twenty years. The men, of whom the plaintiff was one, were placed upon opposite sides of the car, so as to provide for about sixteen men to each rail; and it became their duty, under the order and direction of the assistant road-master, to lift and throw the rails upon the flat cars as they were passing. As soon as a rail had been thrown upon a car, the men were expected to run ahead to the next rail, and have it in position to throw upon the car as soon as it came along. The train was kept moving at a rate of speed variously estimated at from one to four miles an hour; but whatever the rate of speed was, it was fast enough to require the men to use a great deal of expedition in order to throw on the rails and keep up with the moving train. The rails weighed from six hundred to seven hundred pounds, and in consequence of the method employed the work was hard, and required every man to move quickly and with pre-

cision, so as not to interfere with the rest of the men in their attempt, and, while acting in unison, to reach each rail and be in position to throw it on the passing car at the proper instant of time in its passing. While engaged in this work, a rail fell or bounded back off the car, and fell upon the plaintiff's leg and crushed it, so that it had to be amputated below the knee.

The plaintiff claims, and we think the record fully sustains him, that he was exercising due care upon his part at the time of the accident. Especially is this so when his inexperience, his lack of knowledge of the danger to which he was subjected, and the extremely hazardous method employed by the defendant in causing the work to be done, are considered. Although entirely without knowledge of the danger to which he would be subjected, no special information or warning was given him by the assistant road-master, Mr. Wahl, beyond that given to all the men, which, as testified to by defendant's witness, Section-Foreman Cavanaugh, was that "he wanted the men east of Dowagiac to go on the north side, and the men west of there to go on the south side, and he wanted every one of them to take care of themselves that day, and he didn't want no man to get hurt."

The court submitted to the jury the entire question of want of knowledge on the part of the plaintiff of the danger of attending the work, as well as the question of any want of care or of any contributory negligence upon his part, in an entirely fair and impartial manner, and they having settled that question in his favor, we cannot disturb it even if we were disposed to do so.

The defendant alleges error in that the court charged the jury that the master was represented by Patrick Wahl, the assistant road-master, who was in charge of the work; that the defendant was responsible for his management of the work, and that his negligence was the defendant's negligence. Under the case, even as made by the defendant, we think the court was right in so instructing the jury. It is too clear to admit of argument that the assistant road-master, Wahl, had the exclusive, unconditional control of all the men engaged upon this work at the time of the accident. He had charge of and directed the method of its performance, and while it does not appear that he personally had anything to do with employing plaintiff in the first instance, yet his authority was so great that, at least while engaged in this particular work,

he even had control and direction over the section-foreman, Mr. Cavanaugh, who did employ the plaintiff, and who also, as representing the defendant, acted in accordance with Wahl's instructions in reference to the work and method of its performance. Under the facts shown by this record it is apparent that Mr. Wahl, as assistant road-master, had not only full power to direct and control the work and prescribe the method of its performance, but that he did so, and in addition that his judgment as to what men should be employed, and when or how long their employment should continue, or when a man should be discharged from such employment, was absolute, or as nearly so as it is possible for a master to confide a power of that sort to an agent to perform for him. To hold otherwise would be to close our eyes to conditions patent to everybody in all the ordinary business affairs of life. It is evident that the plaintiff and all the other section-hands, including the section-foreman, looked upon Wahl as the absolute manager and controller of the work, and from whom they received their orders and whom they were bound to obey. Under these circumstances, we must hold that the act of Wahl was the act of the defendant. A narrow or technical construction of the rule of *respondeat superior* is not in harmony with the more recent decisions on that point, especially in this state. In the well-considered case of *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180, this court, in an opinion written by Mr. Justice Long, unanimously say:—

“It is difficult to lay down any general rule which shall determine all cases. . . . The tendency of modern adjudications is more and more to relax the rule that those who are engaged in the same common enterprise or business are fellow-servants, especially if it can be pointed out that the one in fault occupies some higher grade or more power than the party injured. . . . Some general rules may, however, be laid down which in many instances may serve as a guide in the determination of the question. It is not to be determined solely from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employee is not a fellow-servant, but a superior or agent, for whose acts the master is held liable.

“Again, if the master has delegated to a servant or em-

ployee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies."

While we do not hold that it is necessary to show it by positive proof in every case of this kind, yet the question of whether or not the servant has power to employ and discharge other servants is important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable: *Chapman v. Erie R'y Co.*, 55 N. Y. 579; *Kansas Pac. R'y Co. v. Salmon*, 11 Kan. 83.

The same doctrine is asserted in an opinion by Mr. Justice Cooley in *Quincy Mining Co. v. Kitts*, 42 Mich. 39, who cites in support of the position taken: *Albro v. Agawam Canal Co.*, 6 Cush. 75; *McAndrews v. Burns*, 39 N. J. L. 117; *Malone v. Hathaway*, 64 N. Y. 9; 21 Am. Rep. 573; *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473. The same principle was again laid down by this court in *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35; and in *Brown v. Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496.

We think the rule, as stated, may now be considered as settled law in this state, and we are not disposed to depart from it. This disposes of all the assignments of error relating to this question. We again hold, as was held in *Palmer v. Michigan etc. R. R. Co.*, 87 Mich. 281, that Wahl stood in the place of the master, and the defendant is liable for his negligent acts.

That the method of doing the work as directed by him was an extremely dangerous one, hardly requires proof. It is self-evident. To require as large a gang of men as he had under his control at the time of the accident to range themselves in line along a train of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passed one of these heavy steel rails, and then to run fast enough along the uneven ground, usually observed along the side of a railroad track, to be able to have the next rail in position to throw on the car of the moving train at the proper moment as it passed, at least without notifying a new and inexperienced man of the great hazard attending what we are happy to be able to say from the testimony was quite an unusual requirement, is in our opinion negligence *per se*. Under these cir-

cumstances defendant is liable for the injury resulting to the plaintiff, unless he was wanting in due care or was guilty of some contributory negligence upon his part, and which fact was settled in his favor by the jury upon the trial of the case.

Some questions were raised upon the trial in relation to the admission or rejection of certain testimony, but under the view we have taken most of them become unimportant.

Upon the trial the plaintiff was asked, "Is there anything on your hip now that indicates the force of the blow?" This was objected to by the defendant's counsel for the reason, as stated by him, "that injury to the hip is not in issue, and the declaration only claims for an injury to plaintiff's limb"; upon which plaintiff's counsel said: "We don't claim damages for it. I introduce it for the purpose of showing the force of the blow and the manner it was inflicted, as bearing on the question of how the rail came off. . . . I want the court to say to the jury that they cannot give any damages for an injury to the hip." Whereupon the court overruled the objection, and permitted the witness to answer. Under the statement made by plaintiff's counsel, we are not disposed to think that the action of the court was erroneous, or if it were, that it was prejudicial error.

The defendant also claims error because the trial judge refused to permit testimony showing whether or not plaintiff's counsel had taken the case to prosecute on a percentage, and whether or not he was bearing the expenses of this litigation. In this the judge was right, and the matter is ruled by *Ripley v. Seligman*, 88 Mich. 177, and *Denman v. Johnston*, 85 Mich. 387.

Error is also claimed because certain remarks made by plaintiff's counsel in his argument to the jury which might tend to prejudice them, and induce them to give plaintiff larger damages than they should. We do not say but that there might be cases where this contention would be of force, but we do not think that that effect was produced in this case. The defendant's counsel used language quite as much calculated to produce an opposite result; and if, in the heat of the argument, the counsel for the respective parties slightly overstepped the bounds of professional license in the discussion of the various and important questions they were presenting, we do not think that in this particular case there was prejudicial error.

We have carefully examined the able and exhaustive brief

of the learned counsel for the defendant, and we fail to find anything which can be considered as reversible error. Upon all questions, where the defendant was entitled to it, the circuit judge either submitted them in the language employed by counsel, or as nearly in that language as can reasonably be expected, and this is sufficient to sustain the charge as given.

It follows that the judgment must be affirmed, with costs.

The other justices concurred.

MASTER AND SERVANT — VICE-PRINCIPAL. — A road-master who has general charge of a division of a railroad and of the section-hands at work thereon, with power to employ and discharge them, is not a fellow-servant, but the representative of the company: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180. The power of employing and discharging men was referred to as one of the tests for determining whether an employee is a vice-principal or not, in the following cases: *Brothers v. Cartter*, 52 Mo; 373; 14 Am. Rep. 424; *Mit-hell v. Robinson*, 80 Ind. 281; 41 Am. Rep. 812. *Gunter v. Granterville Mfg. Co.*, 18 S. C. 262; 44 Am. Rep. 573; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; 47 Am. Rep. 653; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372; *Hussey v. Cogger*, 112 N. Y. 614; 8 Am. St. Rep. 787; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Ell v. Northern Pac. R. R. Co.*, 1 N.D. 336; 26 Am. St. Rep. 621; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340; *Justice v. Pennsylvania Co.*, 130 Ind. 321. In Texas this power seems to be regarded as a conclusive test that the servant is a vice-principal: *Missouri Pac. R'y Co. v. White*, 75 Tex. 4; 16 Am. St. Rep. 867; *Nix v. Texas Pac. R'y Co.*, 82 Tex. 473; 27 Am. St. Rep. 897. As to who are principals generally, see note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455-458.

BOWERS v. HOREN.

[93 MICHIGAN, 420.]

VALUABLE DOG, KILLING OF, NOT JUSTIFIED, WHEN. — The law does not justify one in killing his neighbor's valuable dog because the animal has left tracks on his freshly painted porch, has been found on one occasion in his henhouse, and has come around his house at night, chased cats into the trees, and barked.

VALUE OF DOG, TESTIMONY ADMISSIBLE TO PROVE. — In an action to recover damages for the killing of a shepherd dog, chiefly valuable for his ability to herd cattle and horses, farmers who know the characteristics and qualities of the dog, and the value of such an animal to a farmer who keeps stock, may testify as to his value.

Frank H. Rutter and Julian G. Dickinson, for the appellant.

James H. Pound and John F. Cullen, for the plaintiff.

GRANT, J. Defendant shot the plaintiff's dog. Plaintiff brought suit in justice's court, and recovered verdict and judgment for fifty dollars. Defendant appealed to the circuit court, where another jury gave him a verdict of seventy-five dollars, and the defendant appealed to this court. The court below instructed the jury that the defendant was not justified in killing the dog, and that the only question for them to determine was the value of the dog.

1. The charge was correct. The defendant one morning saw the dog in front of his house, and found that he had left some tracks on his freshly painted porch. He thereupon procured his gun and shot the dog. Defendant's wife testified that one night she found the dog in the henhouse; but no damage was done, except that the next morning she found one egg broken. The only other justification offered for killing the dog was that he came around the defendant's house at night, chased cats into the trees, and barked. Defendant knew that plaintiff owned the dog, but never informed him that the dog gave him any annoyance. The law does not justify one in killing his neighbor's valuable dog under these circumstances. It might as well be contended that it is justifiable for one to shoot a neighbor's horse because he is in the habit of breaking into his inclosure, or making a noise around his house at night.

2. The dog was a shepherd dog, and was chiefly valuable for his ability to herd cattle and horses. The plaintiff testified to the characteristics and qualities of the dog, and his ability to herd cattle and horses. Several other witnesses also testified as to their knowledge of the dog, and what they had seen him do. These witnesses were all farmers, and of course knew the value of such a dog to a farmer who kept stock. These witnesses were permitted, under objection, to testify to the value of the dog. It is insisted by the defendant that this was not a case for an expression of the opinion or the judgment of witnesses as to value, and that the value of a dog can be shown only by giving testimony of his qualities, and that the jury must make their estimate from such testimony, unless it be shown that the dog in question possesses a marketable value, from the fact that he belongs to some peculiar breed, or that he possesses some peculiar qualities which render him salable at some approximately regular price. To sustain this doctrine, defendant's counsel cite *Dunlap v. Snyder*, 17 Barb. 561; *Brown v. Hoburger*, 52 Barb. 15; *Smith v.*

Griswold, 15 Hun, 273. These cases expressly overrule the case of *Brill v. Flagler*, 23 Wend. 356. We cannot concur in the doctrine of these cases. It is not necessary that personal property must have a market value in order to render such opinions competent. The value of a horse depends upon his qualities for farming, or trotting, or family use, or for many other kinds of work. Clearly, jurors who were not farmers would not be competent to determine the value of a farm horse, simply from a description of the horse, statements of the work he will do, and the qualities he possesses. No doctrine is better settled than that in such case the evidence of farmers who know the value of such horses is competent to aid the jury in determining the value. This principle applies with equal force to the case of a shepherd dog, whose value, like that of a horse, depends upon his qualities. One may testify to the value of land, although it has no market value: *St. Louis etc. Ry Co. v. Chapman*, 38 Kan. 307; 5 Am. St. Rep. 744.

Judgment affirmed.

MCGRATH, C. J., LONG and MONTGOMERY, JJ., concurred. DURAND, J., did not sit.

ANIMALS—VALUABLE DOG—KILLING OF NOT JUSTIFIED, WHEN.—Justification as a defense to an action for killing a dog is not established by showing the animal to have been merely troublesome at times, unless his disposition was such as to render him a nuisance to the community: *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677, and note. Where one kills a dog which is on his premises, but doing no damage, he is liable to the owner in an action of trespass: *Brent v. Kimball*, 60 Ill. 211; 14 Am. Rep. 35. In the case of *Simmonds v. Holmes*, 61 Conn. 2, the defendant was held to be justified in killing a dog for sleeping upon a bed of young plants in his garden and seriously injuring them. A dog which is in the habit of haunting the dwelling-house of another by day and night, and which by barking and howling disturbs the peace, is a nuisance, and if necessary may be killed: *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175, and note.

ANIMALS—EVIDENCE OF VALUE OF DOGS.—The value of a dog may be either his market value or some special value to his owner, to be ascertained by reference to the usefulness and services of the dog: *Heilighmann v. Rose*, 81 Tex. 222; 26 Am. St. Rep. 804; *State v. McDuffie*, 34 N. H. 523; 69 Am. Dec. 516.

HAIRE v. OHIO FARMERS' INSURANCE COMPANY.

[93 MICHIGAN, 481.]

INSURANCE COMPANY BOUND BY ITS AGENT'S KNOWLEDGE OF TITLE TO PROPERTY INSURED. — Where a widow insures property belonging to the minor heirs of her deceased husband, making the application in their behalf, they having no guardian, wherein she states that they own the property in fee-simple and that it is unencumbered, the only claim against the property being her dower interest, and the company's agent having, at the time he accepts the premium and issues the policy, full knowledge of such dower interest, his knowledge is the knowledge of the company and binding upon it, and it cannot repudiate the contract after a loss occurs; nor is such policy forfeited by the fact that she subsequently insures her dower interest in the property in another company. In order to assert a forfeiture of an insurance policy on the ground of double insurance, the second policy must have been made to the same persons mentioned in the first policy, and on the same interest in the same property.

Butterfield and Keeney, for the appellant.

T. J. O'Brien and J. H. Campbell, for the plaintiff.

DURAND, J. On January 2, 1888, the defendant, in consideration of fifteen dollars, charged as a premium, issued its policy of insurance to the heirs of the estate of Eugene Weatherwax, insuring them for three years against loss or damage by fire to the amount of fifteen hundred dollars, being one thousand dollars on a dwelling-house and five hundred dollars on a barn, situated on property which was owned by Eugene Weatherwax at the time of his death. He died intestate, and at the time of his death he left surviving him as his sole heirs his two children, Don E. and Jessie E. Weatherwax, then infants of tender years, to whom the insured property descended, subject to the dower interest of his widow, Mary E. Weatherwax. The widow, with the advice and assistance of relatives, among whom was the uncle of the children, J. Weatherwax, looked after the children and their estate as any prudent and loving mother would do. The J. Weatherwax referred to was the agent of the defendant company at the time the policy was issued. He knew the exact condition of the title, and that the two children spoken of as heirs of Eugene Weatherwax were the owners of the fee of the property, and that the widow, who was their mother, owned a dower interest therein. At that time these infants had no legally appointed guardian, and the application for the insurance in their behalf was signed by the mother, under

the advice and direction of J. Weatherwax, the agent of the defendant company.

In September, 1890, Mary E. Weatherwax, by the advice and direction of a Mr. Hall, who was her uncle, and knew about the title and condition of the property, and who was at the time an agent of the Rochester German Insurance Company, obtained an insurance to herself on the property above referred to, and upon other personal property belonging to her, for an amount not exceeding two thousand two hundred dollars, and not exceeding the interest of the insured in the property covered by the policy.

On November 4, 1890, the barn burned. The agent of the Rochester German Insurance Company, upon hearing of the loss, went to the house of Mrs. Weatherwax, and told her that he did not think his company was obliged to pay anything on its policy, but he was a friend of hers, and wanted no trouble, and he would return her the premium, and pay \$350, if she would accept it, and cancel the policy issued by the Rochester German Insurance Company. This she consented to do, and the matter, so far as that company was concerned, was then and there ended.

Proofs of loss in behalf of the heirs of Eugene Weatherwax were made and presented to the defendant company, and it declined to pay the loss. Herbert Haire was then duly appointed the legal guardian of the infant heirs, Don E. and Jessie E. Weatherwax, and this suit was brought by him, as such guardian, to recover against the defendant company on the policy first referred to for the loss sustained.

The defendant contends that the policy in suit is void, because in the application signed by Mary E. Weatherwax she stated that the heirs of Eugene Weatherwax owned the property in fee-simple and that it was unencumbered, when in truth and in fact she, as widow, held a dower interest in it; and also that because she stated in the proofs of loss that the subsequent insurance in the Rochester German Insurance Company was on her dower interest, and that she had not procured any insurance upon the heirs' interest in the property subsequent to the one issued by the defendant company, the policy is forfeited under a clause contained in it which provides that, "Any misrepresentation, concealment, or false swearing in any statement or affidavit in relation to loss or damage shall cause a forfeiture of all claims under this policy."

No suspicious circumstances were developed in relation to the fire, or what caused it, and no claim that it was not a *bona fide* loss was made; nor was there any contention that the loss on the barn did not equal or exceed the amount for which it was insured. Under these facts the circuit judge directed the jury to find a verdict for the plaintiff for the amount of the loss on the barn as expressed in the policy, amounting, with interest, to the sum of \$524.33. The defendant claims error.

We think the circuit judge was right. The heirs of Eugene Weatherwax, to whom this policy was issued, were the owners of the fee. There was no encumbrance upon the property. The only claim against it was the dower interest which the widow held in it, and of which the agent of the defendant company had full knowledge at the time he issued the policy and accepted the premium from her in behalf of the defendant. His knowledge must be considered as the knowledge of the company, and binding upon it; and it would be a gross injustice to permit the defendant under such circumstances to take the money of the insured, giving them to understand that the insurance is valid, and when a loss occurs repudiate the contract because of a technical variance from its conditions, but of which it, by its agent, had full knowledge; especially while at the same time it retains the money paid to it for a supposedly valid insurance. Such a rule would be unsafe and inequitable, and would enable the defendant to consider the contract good in so far as it contributes to its advantage, and to repudiate it when a loss occurs.

Neither do we think the policy of the Rochester German Insurance Company to Mary E. Weatherwax avoids the policy in suit. It was not a policy to the heirs of Eugene Weatherwax, and so far as appears they had no knowledge of it; and, if they had, it would not have deprived them of their rights under this policy. They could not prevent her from obtaining insurance upon her dower interest in this property. She had a right to do so if she chose, and it must be held as well-settled law that, in order to assert a forfeiture of this first policy, the second policy must have been made to the same persons mentioned in the first policy, and on the same interest in the same property: 7 Am. & Eng. Ency. of Law, 1015; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635; *Guest v. New Hampshire etc. Ins. Co.*, 66 Mich. 98; *Hall v. Niagara etc. Ins. Co.*, 93 Mich. 184; *ante* p. 497.

This must dispose of the case in favor of the plaintiff. Some points were raised upon the trial in reference to the admission of certain testimony offered, but as under the view we have taken they are immaterial, they will not be noticed.

The judgment of the circuit court will be affirmed, with costs of this court.

INSURANCE — COMPANY BOUND BY AGENT'S KNOWLEDGE AS TO TITLE OF PROPERTY INSURED. — An insurer is affected by its agent's knowledge of the fact that the insured building stood on leased premises: *Insurance Co. v. National Bank*, 88 Tenn. 369; or that the insured has only a leasehold interest in the buildings on the which the policy is issued: *Philadelphia Tool Co. v. British America Assur. Co.*, 132 Pa. St. 236; 19 Am. St. Rep. 596, and note. See note to *Butz v. Ohio etc. Ins. Co.*, 15 Am. St. Rep. 318; note to *Menk v. Home Ins. Co.*, 9 Am. St. Rep. 162, 163; note to *Beal v. Park etc. Ins. Co.*, 82 Am. Dec. 722.

BEEBE v. OHIO FARMERS' INSURANCE COMPANY.

[93 MICHIGAN, 514]

INSURANCE POLICY COVERING PROPERTY OWNED BY TWO PERSONS MAY BE RECOVERED UPON BY ONE, WHEN. — Where a policy of insurance covers property owned in severalty by two persons insured, and the company's agent who issued the policy had knowledge of that fact at the time of its issuance, one of the owners may maintain an action in his own name to recover for a loss affecting his portion of the property.

WAIVER OF CONDITIONS OF POLICY OF INSURANCE BY AGENT. — Where an insurance agent, authorized to issue policies without referring the applications to the company, fails to indorse upon a policy issued by him a permission granted by him to mortgage the insured property, as required by the provisions of the policy, such failure will not avoid the policy, the agent having taken an active part in procuring the money for which the mortgage was given, advised in regard to it, and assured the insured that she was protected by the policy, notwithstanding the provision of the policy that no agent, officer, or other representative of the company shall have the power to waive any provision thereof except in writing.

POLICY OF INSURANCE FILLED OUT BY AGENT OF COMPANY NOT AVOIDED BY MISSTATEMENT, WHEN. — Where an agent of an insurance company who has authority to issue policies without first referring the applications to the company, with full knowledge of the amount of an encumbrance upon the property insured, fills out the application and procures the insured to sign it without reading it to her, the company cannot avoid the policy because the amount of the encumbrance is greater than that stated in the application.

T. E. Barkworth, for the appellant.

Luke S. Montague, for the plaintiff.

LONG, J. This action was brought upon two insurance policies. Plaintiff had judgment. Defendant brings error.

The cause was tried before the court without a jury, and the court found substantially that the plaintiff was the owner in fee of a farm situate on sections 8 and 17, in the township of Putnam, in Livingston County, the land being used together as one farm. On the day the policies were issued (June 30, 1890) there was situate upon that portion of the farm on section 8 a dwelling-house occupied by plaintiff as her residence, a barn, storehouse, pigpen, corn-house, crib, and wheat-house; and upon that portion of the farm on section 17 another barn. These barns were within ten rods of each other, a highway running between them, and the other barns were all within twelve rods of the barns; both barns and the other buildings being used for general farm purposes. The plaintiff kept upon the farm stock, tools, and implements, and had crops and produce upon it.

On the above day, the defendant issued its two policies, — the one, No. 1440, covering barn No. 1, on section 17, to the amount of \$750, and barn No. 2, on section 8, at \$150; and the other policy, No. 1,441, made to the plaintiff and Mrs. Sophia Webb, and covering dwelling-house No. 1, household furniture, barn No. 1, hay, grain, fodder, and seeds while therein, live-stock while therein, and against lightning on the farm, storehouse, horse-barn, hay, grain, and fodder while therein, live-stock while therein, and against lightning on the farm, farming implements, wagons, carriages, and harness while in barns or barn insured, dwelling-house No. 2, household furniture and clothing while therein, barn No. 2, hay, grain, fodder, and seed while therein, pigpen, corn-house, crib, wagon-house, wagons, carriages, and farm tools while therein, and the wheat-house, in the total sum of \$4,700. A writing was indorsed on policy 1,441, that "it is understood that produce is covered in barns, in granary, in crib, and hay stacks within twelve rods of the buildings." December 17, 1890, further insurance to the sum of eight hundred dollars was placed in policy No. 1,440, "on produce while in barn and sheds, the same being the barn south of the road on section 17, and designated originally in said policy No. 1,440 as 'barn No. 1 and foundation.'"

At the date the policies were issued, Governor Felch held a mortgage of thirteen hundred dollars, with accrued interest thereon of seven hundred dollars, on the twenty acres of land

on section 17. One Thomas Burkett held a chattel mortgage for five hundred dollars, given by plaintiff upon fifty acres of beans then growing on the farm, the chattel mortgage being collateral and additional security for the same indebtedness covered by a real-estate mortgage held by Burkett. Permission was given upon the policies for the chattel mortgage of five hundred dollars, as additional security, to be placed on produce; "loss, if any, on produce payable to Thomas Burkett, mortgagee, as his interest may appear"; and upon policy No. 1,441 was indorsed: "Loss, if any, on real estate payable to Thomas Burkett, mortgagee, as his interest may appear." Upon policy No. 1,440 was indorsed: "Loss, if any, on real estate payable to A. Felch, mortgagee, as his interest may appear." August 15, 1890, the defendant, through its agent, further indorsed upon the policies: "Further chattel mortgage for \$700 permitted, to put in and secure crops, but \$350 returned and not used."

At the date the policies were issued, John Dyer held a bill of sale given as security upon certain personal property owned by the plaintiff. This was dated June 26, 1890, and was to secure the sum of two hundred dollars. On the day the policies were issued, Mr. Morris, the agent of the defendant company, dictated a new bill of sale to secure the payment of the same indebtedness to Mr. Dyer, to take the place of the one of June 26, 1890. This was delivered to Mr. Dyer, and the old one taken up. Also, on the date the policies were issued, Enoch Smith held a chattel mortgage given by the plaintiff to him to secure the payment of about two hundred dollars. Just what personal property it covered is not shown. October 9, 1890, the plaintiff gave to Smith a new chattel mortgage to take the place of the one last mentioned, and to secure the same indebtedness; thereby mortgaging to him a horse, a piano, and twelve acres of growing wheat. The horse and piano were insured by policy No. 1,441; but the wheat was still growing on the farm at the time the fire occurred, and none of the property covered by this mortgage was destroyed by the fire. The bill of sale to Dyer and the mortgage to Smith, and the renewal of the same, were known to defendant's agent, but no permissions were indorsed on the policies for the same. No steps were taken by the company to cancel the policies before the fire.

Each policy was preceded by a written application, which was made a part of the policy, and each recited: "This policy

is based upon an application and survey of the property on file, which is hereby referred to as forming a part of this policy."

The following clauses were also printed in and made a part of each policy: "If the property, real or personal, covered by this policy be or become encumbered by a mortgage, trust deed, judgment, or otherwise, this entire policy shall be void, unless otherwise provided by agreement indorsed hereon or added hereto."

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership, . . . or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage."

"If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured as to material facts."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In the written application for policy No. 1,440 occurred the question: "Is the property encumbered?" The written answer was, "Yes." Then in the application is the following question: "If so, what amount, and the value of the prem-

ises?" The written answer is, "Thirteen hundred dollars,—eighteen hundred dollars." Each of the written applications contains this clause: "The applicant hereby declares and warrants that the above answers and statements are true, and that no statement contradictory to the above was made to or by the agent of the company, and he agrees that this declaration shall be the basis and form part of the contract or policy between insured and the company."

January 17, 1891, a fire occurred without the fault of the plaintiff, which destroyed the barn mentioned in policy No. 1,440 as "barn No. 1," and a large amount of insured personal property, consisting of hay, cornstalks, oats cut and stored, harness, farming implements, 671 bushels of beans, straw partly in barn and partly in stack within twelve feet of the barn, beanpods in barn and shed adjoining, and grain bags, making total loss under both policies of \$2,343.19, for which plaintiff had judgment. The value of the barn was in excess of the insurance.

The objections to the proceeding relate entirely to the conclusions of law reached by the court below, upon the grounds, —

1. That the plaintiff could not bring suit on both policies, joining the same in one action and in her sole name.

2. That policy No. 1,440 was void, because the amount of the Felch mortgage was incorrectly stated in the application.

3. That the policies were void because the chattel mortgages were not permitted by writing indorsed upon them.

It appeared, in the findings of the court, that no part of the property belonging to Sophia Webb was destroyed by fire. The property covered by policy No. 1,441 belonged partly to the plaintiff and partly to Sophia Webb, each owning in severalty their respective shares, although the property thus secured was commingled and used in common by them for farming purposes. The only question bearing upon title to the personalty in the application for that policy was addressed both to the plaintiff and Sophia Webb, as follows: "Are you the absolute owner of the personal property to be insured? *Answer.* Yes." It is evident that, if the property of both of the insured under this policy had been destroyed by fire, a joint action could have been brought by them, and the proceeds of the judgment afterwards apportioned between them according to their respective interests in the property: *Castner v. Farmer's etc. Ins. Co.*, 46 Mich. 18. In the above case

it was said: "When the entire property belongs to the persons insured, it can make no necessary difference to the insurer in what way their interests are apportioned. If they deem it material, they should inform the applicant before accepting his money."

In the present case, much more clear is it that the insurer should not take advantage of this fact, for the reason that Mr. Morris, the agent, was fully informed where the title rested, and had assured the plaintiff that her interests were fully protected under the policies. Neither was the answer to the question in the application as to title of the personal property contrary to the true state of facts. Each owned in severalty, and they were the absolute owners of it.

It is contended: 1. That there was material misstatement as to the amount of encumbrance on the real property in policy No. 1,440; 2. That the placing of the chattel mortgages on the property, without the written permission of the company indorsed on the policy, worked a forfeiture.

It appears from the findings of the court below that Mr. Morris, the defendant's agent, was clothed with full power to issue policies. He took the applications, approved them, and, without forwarding them to the company, at once issued the policies, having been furnished with blanks for that purpose. Before the policies were made out, and at and before the applications were made, he knew of the Felch mortgage and the accumulated interest. In the presence of the insured he filled out the applications, and told them to sign, without reading the applications to them, or advising them of the contents. He knew all the facts in regard to the mortgage encumbrance, and the situation of the personal property with its encumbrances. After the applications were made, he assured the parties that they were fully protected under the policies. He also knew of and permitted the additional mortgages to Smith and Dyer, and advised Mrs. Beebe in the execution of them. No part of the property covered by the Smith and the Dyer mortgages was destroyed.

It is contended, however, that by the terms of the policies the plaintiff cannot be heard to say that this was done by and with the full knowledge of the defendant, as by the terms of the policies no officer, agent, or other representative of the company had power to waive any provisions or conditions of them, except such as by the terms of the policies might be the subject of agreement indorsed on them, etc. The claim

is made that this principle was decided in *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908. In that case the policy provided that the agent "has no authority to waive, modify, or strike from the policy any of its printed conditions; . . . nor, in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same."

The question involved there was whether the taking of two thousand dollars additional insurance in another company avoided the policy. Mr. Quinn was the agent of the company, and the plaintiff claimed to have spoken to him about the additional insurance, and after he received his additional policy he claims to have been told by Quinn that it was all right. It was said by this court that that was not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by it; but in the present case it appears that the agent stood in the place of the company, with full power to issue policies without first referring the applications to the company; and the plaintiff relied upon, and had a right to rely upon, the agent, and to presume that the company had knowledge of his acts and ratified them. If the *Cleaver* case is to be construed as laying down such a doctrine as contended for here, it ought at once to be overruled; but we think the case is clearly distinguishable. The present case presents features by which, if that doctrine is applied, the grossest fraud is to be perpetrated upon the plaintiff. Morris, the agent, is an attorney at law, living near the plaintiff. He has been her legal adviser, and knew the situation and surroundings of her property as well as the plaintiff did. He filled out the applications, did not read them to the plaintiff, advised just what property each should cover, knew the amount of the Felch mortgage and interest accrued, knew the amount of each chattel mortgage, and in fact assisted the plaintiff in procuring the money on each. When all had been completed, he assured the plaintiff that the policies were all right, and that she was fully protected; and yet it is gravely contended here that she is not in a position to set up these facts, because the policy contains a clause that no officer, agent, or other representative of the company shall have power to waive any provision of the policy. If no officer, agent, or other representative of the company could waive it, then there could be no waiver. It is like the case of *Wes-*

chester Fire Ins. Co. v. Earle, 33 Mich. 143. In that case the policy provided that there should be no waiver of any of the printed or written conditions, except in writing on the policy, and the court said (p. 153): "The condition, literally applied, would prevent any unindorsed consent by the company itself, by resolution of its board, or by act of its officers, as effectually as by any one else; and the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way precludes himself from making a parol bargain to change it."

In the present case it is attempted, as in *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143, to limit every one connected with the company, either as officer, agent, or representative, to waive by parol the requirements of the policy. The agent had the right, under the policy, to grant permission to place other chattel mortgages upon the property, but was required to write such permission upon the policy. He granted the permission, took an active part in procuring the money upon the mortgages, advised in regard to it, and assured the plaintiff that she was protected, though he did not enter in writing upon the policy the permission to do so. With the power vested in him by the company to issue policies, we think it would be a gross fraud upon the insured to hold that this condition was not waived by the consent of the company. If the company itself could waive compliance with this condition, then it was waived, as held in the case above cited.

What we have said above applies equally to the contention about the Felch mortgage. It is said that, inasmuch as the application and the policy provided that the statements in the former should be treated as warranties on the part of the insured, therefore the representation in the application that the encumbrance was one thousand three hundred dollars, when in fact it was two thousand dollars, was such a misstatement that the policy was void, and no recovery could be had for that reason. As is seen from the findings of the court below, the agent of the company knew just what the encumbrance was. He filled out the application, had plaintiff sign it without reading it to her, assured her it was all right, and that she was fully protected under it. She was not asked to state the amount of the encumbrance, and no fraud or deceit was practiced by her. She did not know of the printed clause in the policy in reference to warranties, and the court found that she was not negligent or careless in failing to read the appli-

cation, under the circumstances, and that she and Mrs. Webb both understood and believed from the conduct and acts of the defendant's agent that the application stated the facts. Under these circumstances the defendant company is not in a position to insist upon the forfeiture of the policy. Instead of a fraud being practiced upon the company, it must be presumed to have the knowledge which its agent possessed; and it would be a gross fraud upon the plaintiff to permit the company to take advantage of such a misstatement in the application, and hold the policy void by reason of it. The case falls clearly within the principle laid down in *Tubbs v. Dwelling-house Ins. Co.*, 84 Mich. 651; *Michigan etc. Ins. Co. v. Reed*, 84 Mich. 531, and cases there cited; *Aetna etc. Ins. Co. v. Olmstead*, 21 Mich. 252; 4 Am. Rep. 483. In the last case it was said by Mr. Justice Cooley: "The general rule undoubtedly is, that in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts and to be bound by their terms; but it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void."

We think the court below, under the evidence and facts shown, very properly ruled that the policy was not rendered void by the misstatement of the amount of the Felch mortgage in the application. Some contention is made that the personal property destroyed was not covered by policy No. 1,441. We think the two policies, taken together, show what the intention of the parties was, and that the property so destroyed was covered by and included in the policy.

Judgment is affirmed, with costs.

MCGRATH, C. J., MONTGOMERY AND DURAND, JJ., concurred. GRANT, J., did not sit.

INSURANCE — WAIVER OF CONDITIONS BY AGENTS: See *Dillrell v. Georgia etc. Ins. Co.*, 110 N. C. 193; 28 Am. St. Rep. 678, and note; *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note; *Grubbs v. North Carolina etc. Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and note; note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 248; note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234; *Brown v. State Ins. Co.*, 74 Iowa, 428; 7 Am. St. Rep. 495, and note.

INSURANCE — AGENT'S KNOWLEDGE OF MISSTATEMENT — WHETHER POLICY AVOIDED. — When a local agent of an insurance company has actual

knowledge of the falsity of an answer to a question in the application for insurance, his knowledge will be imputed to the company, and the policy will not be avoided: *Follette v. Mutual Acc. Ass'n*, 110 N. C. 377; 23 Am. St. Rep. 693, and note with cases collected; extended note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. Rep. 229.

MAHONEY v. DETROIT STREET-RAILWAY COMPANY.

[93 MICHIGAN, 612.]

RAILWAY PASSENGER BOUND TO FURNISH TO CONDUCTOR EVIDENCE OF HIS RIGHT TO RIDE. — A passenger on a railway car is bound to furnish to the conductor evidence, beyond his own statement, of his right to a passage on the car; if he has a valid contract with the company entitling him to ride, but lacks the evidence of that fact, he should pay his fare when the conductor demands it, and seek redress for a violation of his contract.

James H. Pound, for the appellant.

Sidney T. Miller and John C. Donnelly, for the defendant.

GRANT, J. Plaintiff entered one of defendant's cars on Michigan Avenue, going west, intending to go to Thirty-third Street. He paid his fare, five cents, to the conductor. The car he took did not go to Thirty-third Street, but stopped at defendant's barns, near the railroad crossing. This was near the city limits, and it appears that only certain cars went the entire distance. Upon the stoppage of the car the driver unhitched his horses and was driving them to the opposite end, when plaintiff, perceiving this, said to the conductor that he desired to go further. To this the conductor replied, "You can go back in this car, and take the next car up, or get off here and take the next car up." Plaintiff decided to get off there. A car soon came from the barn and started westward. Some employee of the road asked him if he was going on that car, meaning evidently to ask whether he intended to return to the city on the same car. The terminus of the road was but a short distance west of the barns, and plaintiff's destination was only five blocks from where he alighted from the first car. Plaintiff replied, "No"; that he had come up on another car. He was then informed that he would have to pay. This he declined to do. Meanwhile, the car had gone about two blocks. He was then told that he must pay or get off. One of defendant's employees then approached him, took him by the lapel of the coat, and thereupon he alighted from

the car. No force was, in fact, used other than this, and plaintiff claims no injury except to his feelings. Plaintiff did not ask for a "change off" from the first conductor, nor did the conductor offer him one. Plaintiff brought an action of tort to recover for his alleged unlawful and forcible ejection from the car. The learned court sustained his right of recovery, and directed a verdict for nominal damages, holding that it was the plaintiff's duty to pay his fare, and save any injury to his feelings.

It is insisted by the plaintiff that he had a valid contract for carriage from the point where he took the car to Thirty-third street, and that his ejection from the car was, therefore, unlawful and tortious. If it be granted that he had such a contract, still he had no evidence of it except his own statement, and the question is, what was his duty under the circumstances? If the conductor was under legal obligation to accept his statement that he had such contract, then his removal was unlawful; otherwise it was not. Counsel has cited no authority, nor have I found one, which holds that a stranger may enter the car of either a railway or street-car company without any evidence that he has paid his fare, and secure passage by his own statement to the conductor that he has previously paid it to some other authorized agent. It is the duty of the passenger to secure evidence of such payment, or to pay when his fare is demanded. The business of such companies cannot be carried on upon any other basis. This certainly is common sense and experience.

Plaintiff's counsel cites the following authorities in support of his position: *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859; *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25; *Carsten v. Northern etc. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Lake Erie etc. R'y Co. v. Fix*, 88 Ind. 384; 45 Am. Rep. 464; *Toledo etc. R'y Co. v. McDonough*, 53 Ind. 289; *Palmer v. Railroad*, 3 S. C. 580; 16 Am. Rep. 750; *Burnham v. Grand Trunk R'y Co.*, 63 Me. 298; 18 Am. Rep. 220; *Eddy v. Rider*, 79 Tex. 57; *New York etc. R. R. Co. v. Winter's Adm'r*, 143 U. S. 60. An examination of these cases shows that in all except *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, the plaintiffs had procured and showed to the conductors either tickets or stop-over checks, showing that they had paid their fare, and the disputes arose over the right to ride upon such checks or tickets. It is unnecessary to review these authorities.

In *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, the plaintiff was transferred from one car to another by the conductor, the first car, for some reason, not going through to the passenger's destination. It does not appear just how the transfer was made, but it is quite apparent that when the cars were near together the transfer of passengers was made, and the dispute was whether plaintiff was one of the passengers so transferred. In that case no evidence of transfer was required except the knowledge of the second conductor, whose duty it was to see and know who were so transferred. Under those circumstances the passenger had the undoubted right to insist upon his passage without further payment.

If plaintiff had obtained a "change off" or transfer, and lost it, or if he had purchased a ticket and lost it, or if either had been accidentally destroyed, it would be absurd to hold that he was entitled to a ride upon stating to the conductor that he had such transfer or ticket, but had lost it, or that it was accidentally destroyed. It is apparent that in the present case plaintiff possessed no other or different right from that which he would have possessed had he procured evidence of payment, which had been lost or destroyed. In the one case his contract to ride would be complete, but the only written evidence he had would be lost; while in the other his contract might be equally good, but he had neither asked nor obtained any evidence thereof to show to the conductor in charge of the other car or train, which must serve as a voucher in his settlement with the company. It is a novel doctrine that one may compel the agent of another to accept without question, and without opportunity to investigate, his verbal statement that he has a contract with his principal, and especially where frequent frauds upon the principal must inevitably result as the consequence of such a doctrine. It was the plaintiff's reasonable and clear duty to pay his fare, and seek redress from the defendant for a violation of his contract.

In the case of *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 346, 26 Am. Rep. 531, Mr. Justice Marston said: "There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims."

In *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, plaintiff paid his fare. The language of the court in that case, that "it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true," must be held to apply to the circumstances of that case, where the plaintiff had a ticket. That statement would be most unreasonable in the case of one having no ticket.

Several authorities in support of the rule above stated will be found cited in *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 346, 26 Am. Rep. 531. The rule and the reason therefor are very ably stated in *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, and are also supported by the following cases: *Yorton v. Milwaukee etc. R'y. Co.*, 54 Wis. 234; 41 Am. Rep. 23, and authorities there cited; *Peabody v. Oregon R'y & Nav. Co.*, 21 Or. 121; *McKay v. Ohio Riv. R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913.

Inasmuch as the court should have directed a verdict for the defendant, it is unnecessary to discuss the question of damages.

Judgment affirmed.

The other justices concurred.

RAILROADS — DUTY OF PASSENGERS TO FURNISH EVIDENCE OF RIGHT TO BE ON TRAIN. — As between a passenger and a conductor, the ticket is conclusive evidence of the passenger's rights, and if it does not entitle him to ride, he may be ejected without having any right to an action in tort. Under such circumstances his remedy is by an action on the contract for giving him the wrong ticket: *McKay v. Ohio etc. R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913, and note; *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481, and note. The rule requiring passengers to surrender their tickets to the conductor is a reasonable one, and may be enforced: *Illinois etc. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138, and note. For a discussion of the rule requiring passengers to exhibit and surrender their tickets when requested by the conductor to do so, see extended note to *Commonwealth v. Power*, 41 Am. Dec. 473; also note to *Boston etc. R. R. v. Chipman*, 4 Am. St. Rep. 294.

PEOPLE v. WEITHOFF.

[93 MICHIGAN, 631.]

GAMING-ROOM, WHAT IS. — A room fitted up for the purpose of furnishing information to enable persons meeting therein to exercise their judgment in laying wagers upon horse-races occurring in another part of the country, and who pay their money irrevocably into the hands of the keeper of the room, to wager it with persons present at the races, the gains of the wager being paid within the room, and the losses being made known to those betting therein, is a gaming-room within the meaning of the Michigan statute, which makes it a misdemeanor for any person, for hire, gain, or reward, to keep or maintain a gaming-room.

Henry M. Duffield and Don M. Dickinson, for the respondent.

A. A. Ellis, attorney-general, and *Samuel W. Burroughs*, prosecuting-attorney, for the people.

MONTGOMERY, J. The respondent was prosecuted under section 2029 of Howell's Statutes, the information charging that the said respondent did, for hire, gain, and reward, keep and maintain a gaming-room, contrary to the provisions of said section. The section reads: "Any person who shall, for hire, gain, or reward, keep or maintain a gaming-room, or a gaming table, or any game of skill or chance, or partly of skill and partly of chance, . . . shall be deemed guilty of a misdemeanor."

The evidence on the part of the prosecution showed that the respondent occupied and maintained a room, kept a telegraph operator therein, and, for a commission paid by any person telegraphed to Guttenberg, New Jersey, the amount of money the person desired to bet, and the name of the horse chosen by him in the race at Guttenberg. The person desiring to have his money forwarded to Guttenberg first made out an order as follows:—

"Please execute for me on the race track at the races to be held this day on the grounds of the —, in the county of —, state of —, or at any other place or time, the sum of — dollars, — and do not, under any circumstances, accept odds on this race at the said race track at a less price than —. I desire to be positively and distinctly understood, and for this reason only do place in your charge my money, for you to place my said money for me only on said horse above mentioned, and at no other place than on the grounds of said —, during the progress of the races this day; and for this purpose I make you my common carrier.

For the expenses incurred by you in so placing my money — my special money — on the grounds of the said —, I agree to pay you the sum of five cents."

A blackboard is kept in the room, upon which is recorded at brief intervals the position of the horses in the race. The man at the blackboard, who does the marking, is called the "marker," and the man at the ticket office is called the "ticket agent." There are also employed the telegraph operator and a "helper."

The trial judge instructed the jury, basing his instructions upon the testimony given by one Crandall, as follows: "If you believe beyond any reasonable doubt that on the 5th of January a horse race was about to take place at Guttenberg, New Jersey, and that at the room in question a person in the defendant's employ sold tickets for that purpose, sold to Mr. Crandall a ticket, for which \$1.05 was paid, then and there gave Mr. Crandall the names of the horses that were to participate in the race then about to take place at Guttenberg, and he was directed to place the money of Mr. Crandall (\$1) on the horse named by Mr. Crandall, and Mr. Crandall then paid to the person so selling him a ticket in this room five cents commission, and the money was so placed as agreed, and the result of the race so announced as won by the horse on which Mr. Crandall placed his money, and you believe the money of Mr. Crandall was so placed as a stake or wager, then that room was a gaming-room, and if kept for that purpose, was evidently within the meaning of the statute."

The statute in question was exhaustively considered in *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557. It was there held that betting on the result of a horse race is gaming; that a room used for the purpose of facilitating the betting on horse races is a gaming-room, within the meaning of this statute; and that it is not essential to the offense either that those who bet or wager should be engaged in the game, or that the game upon which the bet is laid be conducted within the room.

It is urged for the defense here that no actual betting occurred on the premises; that the defendant had no greater responsibility for the bets than the servant of a telegraph company, who sends dispatches directing that money be wagered; and that, as no bet or wager is actually made in the room, it is not a gaming-room. We think this contention ignores the real substance of the transaction. The money is

placed in the hands of the defendant by one party to the wager, and, if he wins, he receives the money won in this room; if he loses it, knowledge of the loss is brought to him in this room. That it requires the intervention of another agency does not relieve the respondent. It would be a reproach to the law if it were possible that responsibility could be avoided by any such subterfuge as is apparent in the very scheme adopted by the respondent in this case. That the purpose in fitting up this room was to furnish the information which enables persons to exercise their judgment in laying wagers; that money is paid into the hands of defendant irrevocably, to wager it; and that the gains of the wager are paid and the losses made known to those making bets within the room, — are beyond question. We think this constitutes the room a gaming-room, within the meaning of this statute.

Respondent's counsel rely upon the case of *People v. Wynn*, 128 N. Y. 599, 12 N. Y. Supp. 379, as sustaining their contention. The statute under which the conviction was had in that case provides that, "A person who keeps any room . . . with books, apparatus, or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools, and any person who records or registers bets or wagers, or sells pools, upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, . . . is punishable by imprisonment for one year, or by fine not exceeding two thousand dollars, or both."

The third count of the indictment contained the charge of keeping, exhibiting, and employing devices and apparatus for the purpose of recording and registering bets or wagers. A similar order was executed by the prosecuting witness to the one above quoted in the present case. It was held that the evidence was insufficient to justify a conviction under the third count of the indictment. The court said: "There was not a particle of evidence which can be possibly twisted or tortured into an offense therein described. The only evidence is that there was a blackboard on the wall. What that blackboard was ever used for is not at all explained by the evidence, and there is no presumption of guilt. It is true that the witness stated that the room was not fitted up as a school-room; but blackboards may be innocently used for many other purposes and in many other places than school-houses. There was not the slightest particle of evidence which would justify the submission of any question under the third count,

and it was clearly error in the court to deny the request of the defendant as to this count of the indictment."

It will be seen that the question of whether the room in question was a gaming-room was not involved, and the distinction between the two statutes is apparent. The case does not sustain the defendant's contention.

The conviction will be affirmed.

GAMING. — Betting on horse races is illegal, unless the race takes place upon a track situated in this state inclosed by a fence, and the bet is made within that inclosure: *Ransome v. State*, 91 Tenn. 716; note to *State v. Smith*, 33 Am. Dec. 135. A conviction may be had for playing cards in an "out-house where people resort": *Downey v. State*, 90 Ala. 644. That defendant and other persons were playing "poker" in a room with cards and chips, the chips being of different colors and values, and that defendant took a percentage of the game is sufficient evidence to sustain a verdict of keeping a gaming-room: *Ransom v. State*, 26 Fla. 364. See note to *People v. Weithoff*, 47 Am. Rep. 566.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BLINN *v.* CHESSMAN.

[49 MINNESOTA, 140.]

NOTICE OF CONTENTS OF CONVEYANCE. — IT MAY BE PRESUMED AS A FACT THAT A GRANTEE who personally accepts and retains a conveyance knows its contents.

CONVEYANCE TO GRANTEE BY WRONG NAME. — One who accepts a conveyance in which his name is not correctly stated or spelled, is deemed to have adopted that name for the purpose of acquiring and holding title to the property.

JUDGMENT QUIETING TITLE, IN WHICH THE NAME OF THE OWNER IS INCORRECTLY STATED or spelled, though the summons is served by publication only, is nevertheless binding upon him, if it is the name by which he is designated in the conveyance by which he acquired title. By accepting the conveyance, he consents to be known by that name in all proceedings relating to the land so conveyed to him, and if that name is used in a legal proceeding or notice, he is presumed to understand that it is addressed to him.

PROCESS. — A RETURN BY A SHERIFF indorsed upon a summons against two defendants that he had been unable to find the within-named defendants, G. C. and J. S. H. will be construed to mean that he could not find either of them.

John C. Judge and Selden Bacon, for the appellant.

David McC. Scribner, for the respondent.

DICKINSON, J. The land, the title to which is the subject of this action, was purchased by the defendant George Chessman from one Forrest in 1857. A deed of conveyance was executed to the defendant, and he caused it to be recorded. It appears from the record of the deed, and was found by the court, that in the deed the name of the grantee was written "George Cheeseman," the name being so written in the in-

strument as recorded, as well as in the index of the same. It was found as a fact that the defendant knew when he accepted and recorded the deed that his name therein was thus erroneously written. In 1860 he left this state, and has ever since been a non-resident thereof. In 1882, one Leonard, claiming to own the property, commenced an action in the district court against George Cheeseman and one J. S. Hubbard to determine their adverse claims to the property. The summons in that action was served by publication, and upon proof of default on the part of the defendants the cause was heard, and judgment was rendered and entered, adjudging the said Leonard to be the owner of the property in fee-simple, and that neither of the defendants in that action had any interest in it. The plaintiff has succeeded to whatever title Leonard had, and the principal question here presented is, whether that judgment against Cheeseman was of effect as to this defendant Chessman, as respects his title to the land.

The case justified the finding that when the defendant accepted the deed and placed it on record, he knew that his name as grantee was erroneously written in it. It may be presumed as a fact that a grantee who personally accepts and retains a deed of conveyance knows the contents of it: See *Tolbert v. Horton*, 31 Minn. 518. Whether in such a case the presumption would be conclusive, we do not consider. Assuming that it may be overcome by proof to the contrary, the evidence in this case opposed to the inference to be drawn from the deed and from the facts above stated was not of controlling force.

The court was right in treating the judgment as binding upon this defendant, so far as concerned his interest in this land. This conclusion is not based upon the ground of the likeness of the two names, either in spelling or in sound; but upon the ground, upon which also the decision of the court below was placed, that the defendant is to be deemed to have adopted the name of Cheeseman for the purpose of acquiring and holding the title to this land, and he can have no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. From the fact that this was not his true name it does not follow that the court did not acquire jurisdiction. If he had assumed this name, or any other, generally and for all purposes, and especially if he had come to be known by the name assumed, there would be no doubt that legal pro-

ceedings against him in such name would, in general, be sustained. The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him. If such a name is employed in legal process or notices, whether served personally or by publication, where such service is authorized, the notice is effectual; the person who has assumed the name is presumed to understand that the process or notice addressed in that name is addressed to him.

In this case it is probably true that the defendant did not intend to change his name, nor to adopt for general purposes the name of Cheeseman; but he did, if he knew the misnomer, as we must assume he did, most effectually assume that name for the purpose of taking and holding the title to this land. He not only accepted the conveyance made to himself by that name, but he placed it on record, for the purpose and with the effect, presumably, of giving notice to the world that the title had been so conveyed and was so held. He must be deemed to have understood that thereafter persons becoming interested in the land would consult the record, and might be expected to act upon the notice thus communicated to them. If in legal proceedings concerning the title process or notice should be addressed to "George Cheeseman," he should respond, if he would protect his rights, although that was not his true name. In proceedings concerning this land it would be at least quite as likely that the name disclosed by the record as the grantee would be used in a summons or notice intended to be addressed to such grantee, as that the record should be disregarded, and the true name of the defendant used. Hence there was as much reason why his attention should be arrested by the name of George Cheeseman in a published summons or notice, as there would be if his true name were used. He had placed himself under the necessity of having regard to the former as well as to the latter. He cannot well complain that the name in which he took the title, and which he put forth to the world by the records as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title. That name was a sufficient designation of this defendant in the action instituted by

Leonard, and the misnomer did not prevent the court acquiring jurisdiction.

It is contended that the publication of the summons in the former action was not authorized, because the return of the sheriff, preliminary thereto, was that he had been unable to find "the within-named defendants George Cheeseman and J. S. Hubbard" within his county. It is said that this was in effect only a return that both of the defendants could not be found. The return should not be so construed, although that is its literal meaning. That would make the return wholly immaterial, and irresponsible to the duty resting upon the officer. It was his plain and well-understood duty to serve the summons upon each of the two defendants, and if either of them could not be found, to so make return, stating particularly the fact. This return was an official act, and in its construction regard should be had to the maxim *omnia rite acta præsumuntur*. The language of the return, although it involves the common grammatical error of a negative pregnant, is not to be construed so as to convict the officer of either a total disregard of duty or of an attempt to deceive and mislead the court by the statement of a wholly immaterial fact—that both of the defendants could not be found. Unless the return was dishonestly made, its obvious meaning was that neither of the defendants could be found; the statement that the defendants could not be found being made with respect to both of them. It should be so construed.

A point was made in respect to the sufficiency of the affidavit, preliminary to publication, which we regard as not deserving serious consideration.

Order affirmed.

NOTICE. — Constructive notice is treated in the note to *Parker v. Conner*, 45 Am. Rep. 184-190, and notice from circumstances putting one on inquiry, in the note to *Lodge v. Simonton*, 23 Am. Dec. 47-53. A person is chargeable with constructive notice where, having the means of knowledge, he does not use them: *Knap v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Moore v. Township of Kenoskee*, 75 Mich. 332. Thus knowledge of the contents of a will is imputed to a corporation from its knowledge of the existence of a will upon the terms of which title to its stock depends: *Caulkins v. Gaslight Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786; *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467; compare also the note to *Spitze v. Baltimore etc. R. R. Co.*, 32 Am. St. Rep. 384-388.

CONVEYANCE TO GRANTEE BY A WRONG NAME: See generally note to *Fallon v. Kehoe*, 99 Am. Dec. 350, 351. If a person is in existence and ascertained, a conveyance to or by him by a fictitious name passes title: *Wilson v. White*, 84 Cal. 239. So also, where the owner of real estate executed a

deed thereof to a fictitious grantee, and then, under the name of such grantee, executed another deed thereof to another person, the latter was held to have a good title: *David v. Williamsburgh etc. Ins. Co.*, 83 N. Y. 265; 38 Am. Rep. 418.

PROCESS SERVED ON A PARTY BY HIS WRONG NAME will support a judgment against him: *Parry v. Woodson*, 33 Mo. 347; 84 Am. Dec. 51; *contra*, *Bates v. State Bank*, 7 Ark. 394; 46 Am. Dec. 293.

HENDRICKSON v. GREAT NORTHERN RAILWAY CO.

[49 MINNESOTA, 245.]

RAILWAYS — CROSSINGS. — WHERE A RAILWAY AND A PUBLIC ROAD INTERSECT, the rights of a traveler and of the railway company are regarded as equal, but of course the traveler must yield the right of way to a train drawing near. If a collision occurs, the railway company is not liable if it used such reasonable care to avoid it as ordinary prudence would suggest.

RAILWAYS — CROSSINGS — ORDINARY CARE AT WHEN A QUESTION FOR THE JURY. — In the event of a collision at the crossing of a railway and a public road, when it is claimed that the person injured was exercising ordinary care, and that the employees of the railway were not, the courts will rarely undertake to determine the question, but will leave it to the jury, because the measure of ordinary care is so variable that the question of negligence is usually and peculiarly the function of the jury.

RAILROAD CROSSINGS — PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE. In an action by an administrator of a person killed at a railway crossing by being run over by a train, to recover damages for such killing it is not necessary for him to prove that the decedent looked or listened, if it appears that the servants of the railway failed to give the warning signals required by law, and the view of the decedent along the tracks was obscured until he reached the place at which his life was jeopardized and finally lost.

Francis Bergstrom, F. D. Larrabee, and Shaw and Cray, for the appellant.

M. D. Grover, E. A. Campbell, and S. L. Campbell, for the respondent.

COLLINS, J. In this action defendant corporation was charged with having so carelessly and negligently run and operated one of its trains when crossing a public highway as to have brought it in collision with plaintiff's intestate, thereby killing him instantly. The court below ordered and the jury returned a verdict for the defendant upon all of the testimony, and plaintiff appeals from an order denying her motion for a new trial. The crossing, which seems to have been

an exceedingly dangerous one, known as "King's crossing," was about midway between the stations of Darwin and Dassel, some six miles apart, on defendant's line of road. The highway was the main-traveled road between these places, and along the entire distance ran nearly parallel with the railway, crossing it at the scene of the accident. The deceased had resided for several years some eight miles from this crossing, about five miles from defendant's railway at the nearest point, and it was not made to appear that he knew anything of the specially dangerous character of the place, except as knowledge might be imputed to him from the fact that he had previously driven over the road twice, according to the testimony of his widow, the plaintiff.

On this particular day he was driving easterly from Darwin to Dassel, having a pair of horses attached to an unloaded lumber wagon. The train, also going easterly, was a regular passenger, upon time, running thirty miles an hour, and due at the crossing about three o'clock, P. M. Westerly of the crossing was a deep cut, over a thousand feet long, and, at places, more than twenty-five feet in depth. Beside it, on top of the bank and some forty feet from its edge, was the wagon road, and at various places between the road and the cut were piles of earth and bushes or small trees, which naturally obscured the vision of travelers upon the highway, and rendered it more difficult for them to observe a train approaching from the west. When within less than three hundred feet of the crossing, the wagon road entered upon a slight depression in the surface of the ground, and thence through a small ravine, down hill, and bearing northerly to the railway tracks, which were crossed at an angle of about thirty-five degrees between the cut referred to and another on the east.

The limited opportunity for observing the coming of a train can best be judged by the testimony of the engineer, who, at his post upon the south or right-hand side of the cab, was looking out for the crossing. He saw the horses first, the moment they came in sight, and an instant after, the wagon, in which Mr. Hendrickson was seated. In his opinion, the locomotive was not over one hundred and twenty feet from the crossing when the team emerged in view at a point on the wagon road not to exceed fifty feet from the rails.

From this testimony it is evident that Mr. Hendrickson, fully aware of the proximity of a railway crossing, as we must presume him to have been, could not have seen, without get-

ting down from his wagon, and did not see, the locomotive before the moment his horses were discovered by the engineer, as before stated, and who instantly realized that they were uncomfortably close to the track over which the train must pass. By reason of the deep cut, the obstructions to the vision before mentioned, the conformation of the ground over which the wagon road descended to within a few feet of the railway, and the angle of the crossing itself, the risk and hazard to wayfarers upon the road were largely augmented.

These facts and circumstances were peculiarly within the knowledge of defendant company, and the engineer in charge of the locomotive admitted, when testifying, that he knew it to be a dangerous crossing.

To sum up the situation, this junction of ways was of such a nature that a person driving on the public road came down a hill, in a depression or ravine almost parallel with the track, to a point some fifty feet distant, before he could discover a train coming in his rear, and it would then be but about one hundred and twenty feet away. Running at the rate of the one in question, it would cover that distance (unless checked by the brakes) within three seconds. The imperative necessity for ample cautionary signals by the trainmen as they approached this place, the vigilance which ought to be exercised by the traveler upon the highway as he came to the track, and the exceedingly dangerous character of such an intersection, need not be enlarged upon.

There was a sharp conflict of testimony as to whether the whistle was sounded at the caution post eighty rods west of the crossing, or whether the bell was then rung, or rung at all, until a collision with the wagon seemed imminent. The engineer and fireman, and other persons who were on the train, asserted with great positiveness that the whistle was sounded at the post, and that thereafter the bell was rung as the train approached the crossing. Other persons who resided and were at work in the immediate vicinity, some of whom had reason to observe the approach of the train and to notice the signals, if they had been given, were equally as positive that there was no whistle sounded and no bell rung until the engineer discovered the horses within fifty feet of the track.

On this conflicting testimony it stands conceded that the jurors would have been justified in concluding that no cautionary signal was given, and that the defendant's servants were negligent in this respect when driving their ponderous

machinery along the track towards the crossing, a place where every traveler upon the public road is expected to listen for, and therefore has a right to rely to some extent upon, the sounding of a warning or cautionary signal, a signal to be regulated by and commensurate with the necessities of the locality, the risk and hazard at the intersection. More care and vigilance are required at a crossing of extremely dangerous character, as this was, by all parties, trainmen and travelers on the highway, than at a place where there are no obstructions to interfere with sight and hearing, the difference between the parties being that the trainmen are presumed to know all about the peculiarities of the intersection, while the travelers on the highway are not presumed to have the same knowledge. That they are acquainted with the crossing may be shown of course.

As there was testimony that would have justified the finding that defendant was negligent, the real question resolves itself into an inquiry whether the proofs conclusively established defendant's contention that Hendrickson contributed to the negligence which caused his death. This depends wholly upon the testimony of one witness, the only one, aside from the engineer and fireman, who saw the deceased after he came upon defendant's right of way, not far from the point, before mentioned, where he was first discovered by the engineer. This witness was at least thirty rods away, upon the north side of the track, and walking in the direction of the scene of the casualty. He testified that Hendrickson carefully walked his team down the hill, to the point where he could command a view of the track westerly, some fifty feet from the rails, and just at that moment the locomotive emerged in view in the cut about one hundred and fifty feet away, the short, shrill danger-whistles were at once given, the horses became frightened and unmanageable, reared and plunged forward towards the rails, notwithstanding the driver tried to control them, the man, wagon, and team disappeared from his view in the dust and smoke, the crash of the collision coming instantly to his ears. This witness and the engineer and fireman were greatly at variance as to the manner in which the horses were driven towards the crossing, and as to their behavior when the danger signals were given, but these differences were for the jury to pass upon.

We are of the opinion that a case was made which ought to have been submitted to the jury.

Where a railway and a public road intersect, the rights of the traveler and of the railway company are regarded as equal, but, of course, the traveler must yield the right of way to a train drawing near. In other words, if a traveler on a public road, having had an opportunity to learn in any manner of the approach of the railway train, sustains injuries from a collision while attempting to cross the rails when the train is crossing the highway, he has no cause of action. A railway company must be exonerated when a collision occurs at an intersection with a public road, if it has used such reasonable care to avoid the collision as ordinary prudence would suggest. If it has, and a collision ensue, the fault must be with the traveler on the highway, consisting in his failure to exercise ordinary care. In such cases it has been well said that if, as a matter of common knowledge and experience, the trial court sees, upon the undisputed facts in the case, that the injured traveler was not in the exercise of ordinary care, and that the injury was in part attributable to his want of such care, it will, as he has shown no legal cause of action, dismiss the case or direct a verdict against him; but the measure of ordinary care is so variable that the question of negligence becomes usually and peculiarly a function for the jury, and the courts can but rarely declare a particular act to be conclusive evidence of negligence. And that is precisely what was done in this instance, the ruling being the same as if Mr. Hendrickson's view of the railway and the coming train had been wholly unobstructed as he came down the hill towards the crossing.

A plaintiff administrator is not required in all cases of this character to prove affirmatively that his intestate looked or listened. It may be inferred, in view of the circumstances, that the deceased, governed by the instinct of self-preservation, did what a prudent man ordinarily would do to save his life. See *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 157, 18 Am. Rep. 407. It was demonstrated that Hendrickson was in a position or situation extremely perilous to him, and which he had not been cautioned to avoid, if we are to believe plaintiff's witnesses, before he had reached a point in the public road where the train was visible, or when looking for it would have availed. This situation or position became dangerous, not by the simple act of Mr. Hendrickson in driving there, but through the neglect of defendant's servants to give the warning signals required by law (Pen. Code, sec. 343) in sea-

son to prevent his near approach, and it was made still more perilous by the short, sharp danger-whistles made necessary by reason of the neglect before mentioned, blown in such close proximity to the horses as to frighten and cause them to plunge forward upon the tracks directly in front of the destructive force. As was said in *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 78 Am. Dec. 322: "If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveler accustomed to expect this would not only not be so likely to look out for danger, or be in such preparedness to avoid it as he otherwise might have been, and this without any culpable negligence on his part; for, if by the negligence or omission of those in charge of the train his vigilance was allayed, they are not at liberty to impute the consequences of their acts to his want of vigilance, a quality of which they have deprived him."

Assuming, then, as we must, for the jury might have so determined, that no cautionary or warning signals were given, it must be held that if, by reason of this omission or neglect on the part of defendant's servants, Mr. Hendrickson was led to be less vigilant when drawing near to the railway, his view along the tracks being obscured until he reached a place or situation in which his life was jeopardized and finally lost, his want of vigilance cannot be pronounced culpable or concurring negligence, as a matter of law. It is not an absolute answer to the claim for redress made by his legal representative that, notwithstanding the alleged omission of cautionary signals by the persons in charge of the locomotive, he might, by the exercise of greater vigilance, have discovered the approaching train, if he had foreseen a violation of the statute instead of relying, perhaps, on its observance: *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9; 90 Am. Dec. 761.

In respondent's brief, reference has been frequently made to the excellent opportunity there was for observing the line of railway as a person on the public road journeyed easterly from Darwin towards King's crossing. When so journeying, and with a crossing of the track to be made, it would be the duty of the traveler to be watchful, and at all times to exercise ordinary care; but the fact that for two or three miles along the road, and before reaching the point where the view was obstructed, Mr. Hendrickson might have seen the train, had he looked to the rear some distance, was, at most, a simple circumstance to be considered by the jury when considering

the claim that he ought to have seen the train in ample time to avoid the collision. While the view for some two or three miles west of the cut was not interfered with, it was greatly obstructed for a distance of more than a thousand feet, just at the point where the opportunities for observation were most needed, and are ordinarily regarded and made useful. Of course if the train was within range of a traveler's vision, as he looked over or between the piles of earth, small trees, and other obstructions between the track and the highway, it would be seen, but it would remain unseen and unobserved unless it was at the exact place commanded by a view from that precise point of observation. The view and the presence of the train would have to concur as to time and place.

Nearly all of plaintiff's witnesses, residents of that immediate locality, testified that, although no signals were sounded for the crossing, they heard the train coming from the time it left Darwin station, some three miles west; and from this it is maintained by respondent that had the deceased listened, as was his duty when he approached the crossing, he, too, would have heard it coming, and would have been warned in ample time to prevent his driving so near the rails. The fact that the swift coming of the train was clearly manifested to the witnesses by the noise it made when running, conclusively established, it is argued, that the deceased failed to listen, or, listening, neglected to pay attention to the obvious warning of imminent danger; but in this contention respondent's counsel overlooked two conditions, both present, which might have a bearing upon the matter: 1. That Mr. Hendrickson was in an empty lumber wagon, which must have made more or less noise as it was driven along; and 2. And of more moment, probably, that all of these witnesses were well acquainted with the movements of this particular train, knew when it might be expected at Darwin station, as well as at the crossing, while some of them were paying special attention to its coming on that occasion. A stranger to the neighborhood and to the movements of this train would not be expected to know that a train was approaching King's crossing from the west simply because it whistled and blew off steam at Darwin, or because its approach was apparent to those who knew all about its running time and movements.

Order reversed.

GILFILLAN, C. J., absent, sick, did not sit.

RAILROAD CROSSINGS. — The servants of a railroad company and a traveler about to cross the track must exercise mutual care: *Reeves v. Delaware etc. R. R. Co.*, 30 Pa. St. 451; 72 Am. Dec. 713; *Beyel v. Newport etc. R'y*, 34 W. Va. 538; *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64; but the railroad company has the preference and right of way: *Brown v. Texas etc. R'y Co.*, 42 La. Ann. 350; 21 Am. St. Rep. 374. As to the duty of the company to signal the approach of the train, see note to *Louisville etc. R. R. Co. v. Hull*, 13 Am. St. Rep. 93, and *Welsch v. Hannibal etc. R. R. Co.*, 37 Am. Rep. 443-446. Where the duty to ring a bell or sound a whistle is imposed by statute, the omission to perform it is negligence *per se*: *Terre Haute etc. R. R. Co. v. Voelker*, 129 Ill. 510; but this does not excuse a traveler on a highway crossing a track from the exercise of such reasonable care as the law requires to ascertain whether a train is approaching: *Beyel v. Newport etc. R'y Co.*, 34 W. Va. 538; *Rodrian v. New York etc. R. R. Co.*, 125 N. Y. 526. In *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581, the rule is stated more favorably for the traveler, and it is held that he is bound to look only when to do so would aid him in determining whether or not a train is approaching, and that the failure of the engineer to give warning will render the company liable, although the traveler may have been careless in exposing himself to danger.

RAILROAD-CROSSINGS. — **OBSTRUCTIONS TO THE VIEW** of the traveler require him to use additional precautions: *Cincinnati etc. R'y Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96; *Brady v. Toledo etc. R. R. Co.*, 81 Mich. 616; *Beyel v. Newport etc. R'y Co.*, 34 W. Va. 538; *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64; but in such a case he is not, as a matter of law, guilty of contributory negligence because he does not leave his vehicle and go to a point where he can see that the track is clear. The question should be submitted to the jury: *Georgia Pac. R'y. Co. v. Lee*, 92 Ala. 262.

RAILROAD-CROSSINGS. — The presumption of law is, that a person killed at a crossing did stop and look or listen. *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804.

LONG v. DULUTH.

[49 MINNESOTA, 280.]

STATUTE, CONSTRUCTION OF. — **IF EXCLUSIVE RIGHTS OR FRANCHISES ARE CLAIMED** to have been granted by a statute impairing the power of the legislature for further action, the statute should be construed most strictly in favor of the state, and all doubts resolved against the person claiming the exclusive right.

MUNICIPAL CORPORATIONS HAVE NO POWER TO GRANT EXCLUSIVE FRANCHISES or privileges unless such power has been conferred upon them by a statute explicit and free from doubt.

MUNICIPAL CORPORATIONS. — **A GRANT BY A MUNICIPALITY OF THE EXCLUSIVE RIGHT** to supply it and its inhabitants with water for the period of thirty years, is not authorized by a statute conferring power upon it to grant the right to one or more private companies or corporations to erect waterworks and supply it and the inhabitants thereof with water, and reserving the right of the municipality to purchase the works at any time after fifteen years.

SUIT by a tax-payer of the city of Duluth to enjoin it from issuing bonds to raise money with which to construct gas and waterworks. The city was the successor of the village of Duluth. The statute establishing municipal government for the village as amended in 1880, conferred the following powers: "Eleventh. To make and establish public pounds, pumps, wells, cisterns, hydrants, reservoirs, and fountains, and to provide for and conduct water into and through the streets, avenues, alleys, and public grounds of the village and city of Duluth, and to provide for and control the erection of waterworks by said village for the supply of water to said village and its inhabitants, and to grant the right to one or more private companies or corporations to erect waterworks to supply said village and the inhabitants thereof with water, and to authorize and empower such company or corporation to lay water pipes and mains into, through, and under the streets, avenues, alleys, and public grounds of the said village and city of Duluth, and when necessary for properly carrying out the purpose of said company or corporation, to appropriate private property in the village or city of Duluth to the use of said company or corporation in the manner provided by section twenty-nine (29) of chapter seven (7) of said act, and to control the erection and operation of such waterworks, and the laying of such pipes and mains, in accordance with such terms and conditions as may be agreed upon with said company or corporation. Provided, that every grant to a private company or corporation of the right to erect waterworks, gasworks, electric light works, or heating works, as hereinbefore mentioned, shall provide for the sale of such works to the said village or its successors at any time after fifteen (15) years from the commencement of such grant, at a valuation to be agreed upon or determined in a manner to be prescribed in the grant." Under this statute an ordinance was enacted granting the right to construct and operate water and gasworks, and the contention of the plaintiff was that this grant conferred exclusive authority and that the city had no right to construct waterworks nor to issue bonds to aid such construction. A demurrer to the complaint having been sustained, the plaintiff appealed.

Warner and Spangler, for the appellant.

S. D. Allen, for the respondents.

DICKINSON, J. In the year 1833 the village of Duluth was a municipal corporation, having the powers conferred upon it by Special Laws of 1881, chapter 11, and the more specific powers (as respects the subject here to be considered) conferred by Special Laws of 1882, chapter 80. It will only be necessary to direct attention to subdivisions one (1) and four (4) of section three (3) of the latter act.

In the year 1883 the village by ordinance entered into a contract with a corporation named the Duluth Gas and Water Company, — but which for brevity we will designate as the “Water Company,” — by the terms of which there was granted to the water company the privilege of establishing, maintaining, and operating waterworks, laying pipes and placing hydrants in the streets and public grounds for the supply of water for domestic and other purposes, for the term of thirty (30) years. The village on its part thereby agreed to abstain for that period from granting to any other party the right or privilege to lay water pipes in the streets or public grounds, or to furnish water to the village or its inhabitants. Then, in the same sentence, after making a similar provision with respect to the laying of gas pipes and the supply of gas, (except that a different period of time is named,) it is added: “And the said village will likewise abstain from so doing for and on its own behalf.” It is contended by the appellant that the clause last recited relates, not only to the subject of gas supply, which immediately precedes it, but also to that of the water supply referred to in the earlier part of the sentence; so that the agreement of the village is, in effect, that it will not, for the period of thirty (30) years, either grant to any other party than this water company the privilege of supplying water and maintaining a system of waterworks, nor itself exercise the right of establishing waterworks or supplying water. We may assume that this is the proper construction of the ordinance; for, if it is not, the plaintiff (appellant) has no reason for this intervention to prevent the municipal corporation from taking steps to establish and maintain a system of waterworks for itself; and if this is the proper construction of the ordinance, the plaintiff has no cause of action, for reasons which will presently be stated.

The purpose of this action, prosecuted by a taxpayer, is to restrain the present city of Duluth, and its officers, from proceedings already instituted, on the part of the city, for the purpose of establishing, on its own account, a public system

of waterworks. The city is the legal successor of the village and no question is raised as to its being legally bound by the contract made by the village with the water company, and we shall assume that it is so bound. Nor is any question raised as to the right of the plaintiff to prosecute such an action. We have not referred particularly to some features of the complaint relating to the subject of gas, for the reason that it appears that the bonds proposed to be issued are merely for the purpose of raising funds to establish waterworks, and it is not apparent that our inquiry need to be extended beyond that subject. The simple question, then, is whether the municipality became disabled from establishing waterworks for the use of the city and its people by reason of the contract made with the water company, and which, as we assume, in terms provided that the municipal corporation would abstain from doing so for the period of thirty (30) years. In simpler form, the question is whether the village had power to grant an exclusive franchise, and thus to disable itself.

The adjudications upon the subject show it to be no longer a matter of doubt that the legislature, acting presumably for the public good and with due regard for the future as well as present interests of the state, may grant exclusive franchises like that which are claimed to have been bestowed upon this water company; and when that has been done, and the grant accepted and acted upon, it becomes a contract by which the state is effectually bound, and its future governmental power is thereby impaired. It may be admitted, too, that the legislature may delegate to a municipal corporation the authority, by contract, to confer such exclusive privileges concerning matters properly pertaining to municipal affairs; but it is a well-settled principle of construction, applicable both to direct legislative grants and to those indirectly made through the action of municipal corporations, that exclusive rights of this nature are not favored, and a statute which thus has the effect to impair the power of the legislature for future action should be construed most strongly in favor of the state. If there is any ambiguity or reasonable doubt, arising from the terms used by the legislative or granting body, as to whether an exclusive franchise has been conferred, or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such a grant. Public policy does not permit an unnecessary inference of authority to make a contract inconsistent with the continuance of the sovereign power

and duty to make such laws as the public welfare may require: *Nash v. Lowry*, 37 Minn. 261, 263; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 543, 544; *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 791, 796; and see authorities to be hereafter cited. It is hardly necessary to advert in this connection to the fact that municipal corporations have only such powers as are conferred by the legislature and the same principle of strict construction which forbids that a direct grant of a franchise by the legislature be construed as exclusive is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies of the state to grant exclusive franchises or privileges must be as explicit and free from doubt as would be required if the franchise were created directly by the legislature.

Reference to a few of the numerous decisions in which this principle of strict construction has been recognized and applied may properly precede the application which we make of the law to the facts of this case. It may be that in some of these cases the rule of strict construction was carried too far.

In *Minturn v. Larue*, 23 How. 435, it was considered that a city charter, conferring the power to make such by-laws and ordinances as might be deemed proper for making (establishing) ferries, did not authorize the granting of an exclusive privilege.

Fanning v. Gregoire, 16 How. 524, was the case of a legislative grant of the right to the plaintiff to operate a ferry for twenty (20) years, and it was also declared that "no court or board of county commissioners shall authorize any person, unless as herein provided, to keep a ferry within the limits of the town of Dubuque." The city of Dubuque was subsequently created, and the city, in the exercise of its charter powers, granted to the defendant the privilege of operating a ferry. It was held that the earlier grant was not exclusive, and although "no court or board of county commissioners" could subsequently grant another franchise, the legislature could do it, or empower the city of Dubuque to do so.

Richmond Co. Gaslight Co. v. Town of Middletown, 59 N. Y. 228. A legislative act authorizing a town to cause its streets to be lighted with gas, and to enter into a contract with the plaintiff for that purpose, was held not to confer power to make an absolute contract for a term of years. The legislature could not thus be deprived of its power to subsequently legis-

late upon the subject; and its repeal of the authority to light with gas was effectual to terminate the contract so made: See also *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167.

City of Brenham v. Brenham Water Co., 67 Tex. 542, may be thus stated: A city was empowered by its charter to provide itself with water, and was deemed to be authorized to do so by contract. The defendant company was expressly authorized to contract with the city for that purpose. The city entered into a contract with the defendant which the court deemed to have been intended to confer an exclusive right upon the company for the period of twenty-five (25) years. It was held that the city had no such power.

Lehigh Water Company's Appeal, 102 Pa. St. 515, presented these facts: The water company was incorporated in 1860 to supply the borough of Easton with water. In 1867 the borough was authorized to construct waterworks, and to purchase the works of any existing company. This authority, however, did not become effectual until 1881, when it was approved by popular vote. In the meantime the water company, as it was authorized to do, had availed itself by acceptance of the benefits of an act of 1874 providing for the incorporation of water companies, and which declared that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose" until the corporation should have realized profits to a specified amount. It was held that the franchise was exclusive only as respects other companies, and that the borough was not prohibited from supplying water by works constructed by itself, even though that might impair the value of the franchise of the water company.

In *Stein v. Bienville Water-supply Co.*, 34 Fed. Rep. 145, it was held that the granting of the exclusive privilege of supplying a city with water "from the Three Mile Creek" did not prevent a subsequent grant of a right to supply water from another source.

It was considered in *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. Rep. 529, that, under authority to a municipal corporation to cause its streets to be lighted, and to make reasonable regulations with reference thereto, the city was empowered to enter into a contract for the accomplishment of that end, but that it had not authority to thus confer an exclusive right to furnish gas for the period of thirty (30) years.

See also *State v. Cincinnati Gaslight etc. Co.*, 18 Ohio St. 262; *Parkersburgh Gas Co. v. City of Parkersburgh*, 30 W. Va. 435; *Birmingham etc. Ry Co. v. Birmingham St. Ry Co.*, 79 Ala. 465; 58 Am. Rep. 615; Cooley on Constitutional Limitations, 6th ed., p. 250; 2 Dillon on Municipal Corporations, 692, 695.

An examination of the authorities here cited, and of others of like import, readily leads to the conclusion that the charter powers of the village of Duluth were not such as to enable it to confer upon the water company the exclusive right to supply the municipality with water for the period of thirty (30) years. Such power was certainly not expressly conferred. Nor was it necessarily involved in the authority given to contract for a water supply, and to confer the right upon one or more private corporations to establish waterworks and a supply system. Such general language falls short of expressing an intention to confer the power to grant an exclusive franchise which shall, in effect, bind and restrict, not only the village, but the state, in the exercise of its governmental functions, for thirty (30), sixty (60), or one hundred (100) years, or forever. It may be said that the power to contract would be useless unless the privilege conferred may be made exclusive; for otherwise private corporations or persons would not engage in an undertaking involving the necessity for very large expenditure of capital in works which might be rendered unprofitable, if not valueless, by the subsequent action of the municipal or state government. The argument is not without force. The cases cited above and others show that it has often been advanced in support of claims of exclusive privileges, but it has rarely if ever prevailed. It suggests considerations of policy which may influence the legislature to grant, or to authorize the granting of, exclusive privileges; but the principles in accordance with which legislative grants of this kind are to be construed seem to be so clearly established that generally not much weight can be given to such an argument in determining the effect of particular legislative action.

The proviso in subdivision four (4), requiring that in any grant of authority by a village there should be a provision for the sale of the works to the village at any time after fifteen (15) years, has no bearing upon the question under consideration. The proviso requires that the right to purchase shall be a condition of the grant. It imposes no requirement or duty to purchase, and does not justify the inference that the

village could only provide itself with waterworks by purchasing from the company: *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 187. The conclusion is thus reached that the charter powers of the village of Duluth did not permit it to grant an exclusive franchise, binding itself for the period of thirty (30) years not to establish a system of waterworks on its own account, and that it did not become disabled to thus act in its own behalf. This is in accordance with the decision of the district court, although we have assigned different reasons from those which influenced the decision of the learned judge of that court. It is unnecessary to now consider the point upon which his conclusion was based.

Order affirmed.

GRANTS, CONSTRUCTION OF. — Grants in derogation of the rights of the public must be strictly construed, and are never extended by implication: *Leasing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89. Reasonable doubts as to the proper construction of a legislative grant are to be resolved in favor of the state: *Grant v. Leach*, 20 La. Ann. 329; 96 Am. Dec. 403.

MUNICIPAL CORPORATIONS, POWERS OF. — A municipal corporation has only such powers as are granted in express words, necessarily or fairly implied in or incident thereto, and those essential to its declared object and purposes: *St. Louis v. Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; *Huesing v. Rock Island*, 123 Ill. 465; 15 Am. St. Rep. 129; and note to *McCord v. Pike*, 2 Am. St. Rep. 92, 93. The powers so granted are strictly construed: *Whiting v. West Point*, 88 Va. 905; 29 Am. St. Rep. 759.

FRANCHISES, EXCLUSIVE GRANT OF. — That such a grant does not always prevent another subsequent grant to a competitor: See note to *Hudson v. Cuero Land etc. Co.*, 26 Am. Rep. 293, 294.

SIOUX CITY AND ST. PAUL RAILROAD CO. v. SINGER.

[49 MINNESOTA, 301.]

CONVEYANCES, CONDITIONS IN WHETHER NOMINAL. — A condition in a conveyance that intoxicating liquors shall never be sold as a beverage to be drunk on the premises will not be presumed to be a nominal condition and disregarded, though a statute of the state declares that "when any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded."

CONVEYANCE. — A CONDITION THAT "INTOXICATING LIQUORS SHALL NEVER BE SOLD as a beverage to be drunk on the premises, and if the same is so done habitually with the knowledge and consent of the owner, this instrument shall be void," if inserted in a conveyance of real estate is a valid condition subsequent, the breach of which works a forfeiture of the estate granted.

CONVEYANCE — CONDITIONS, NOTICE OF. — EVERY PURCHASER of an estate has constructive notice of, and is bound by, conditions subsequent contained in a conveyance through which he derives title.

CONVEYANCE — CONDITIONS SUBSEQUENT — RE-ENTRY. — The common-law ceremony of re-entry need not be performed as a condition precedent to an action to recover the possession of real property for breach of a condition subsequent.

Daniel Rohrer, for the appellant.

Geo. W. Wilson, for the respondent.

DICKINSON, J. This is an action of ejectment. The facts of the case are as follows: —

The premises consist of parts of two lots in the village of Worthington. In 1872 the plaintiff, then the owner of the land, conveyed it by deed, which was then recorded, and which embraced this condition: "This conveyance is made and accepted on the express condition that intoxicating liquors shall never be sold or vended, as a beverage, to be drunk on the premises, and if the same is so done habitually, with the knowledge and consent of the owner, this instrument shall be void." Through several intermediate conveyances the land passed to the defendant Singer in 1883, and ever since that time intoxicating liquors have been habitually sold, to be drunk on these premises with his knowledge and consent. Judgment was directed and entered for the defendants, the provisions of 1878 (Gen. Stats., c. 45, sec. 46) being regarded as applicable to and controlling the decision of the case. This section is as follows: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." The findings of the court do not show whether or not the plaintiff has, or ever had, any special interest in the enforcement of the condition by reason of its ownership of other lands, or for any other reason. The absence of any finding concerning that matter is explained in the memorandum of the judges, filed with their decision, where it is stated that there was no evidence upon the subject.

The language of the above-recited clause in the deed is such that it must be regarded, if valid, as a condition subsequent, the breach of which would work a forfeiture of the estate granted. It is the language of a condition, and not of a cove-

nant. There is no ambiguity or uncertainty in its meaning; no room for construing it to be anything different from what it is declared to be—a condition upon which the estate is granted. Nor is the condition repugnant to the estate conveyed. The authorities to be hereafter cited are applicable here. See also *Farnham v. Thompson*, 34 Minn. 330, 337, 57 Am. Rep. 59.

It is well settled that an owner of lands may annex such a condition as this to his conveyance, even of the fee, at least if he has any special and substantial interest in the enforcement of the condition: *Plumb v. Tubbs*, 41 N. Y. 442; *Cowell v. Springs Co.*, 100 U. S. 55; *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *O'Brien v. Wetherell*, 14 Kan. 616; *Gray v. Blanchard*, 8 Pick. 284; and see *Pepin Co. v. Prindle*, 61 Wis. 301. Whether such a condition would be deemed void, upon grounds of public policy, if it should appear that the grantor had no such interest, we do not decide. Upon the face of the deed nothing appears which could render void the express condition upon which the conveyance is made and accepted. A grantor may, at least under some circumstances, effectually impose such a condition upon a conveyance of the estate; and it is not necessary, in order to make *prima facie* valid the condition expressed in the deed, that the deed shall set forth or recite the peculiar facts which may legally justify the grantor in annexing the condition to the grant. On its face the condition is effectual. It attends and qualifies the grant. The estate is conveyed and accepted in terms subject to it. If this condition is to be avoided, because in the particular case the circumstances of the grantor were not such as to authorize him to thus restrict or qualify the conveyance of his estate, it can be only upon affirmative proof of the fact relied upon for that purpose. If not thus avoided, the deed must have effect according to its terms, to which the parties have assented.

The statute above recited does not, in our opinion, qualify these propositions. Its language is, "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit," etc., they may be disregarded. This has no relation to the subject of the burden of proof, where evidence may be necessary to disclose the fact, but to the fact itself, either as evinced by the deed, where upon its face the condition is obviously

of no real beneficial nature, or where, the deed not disclosing the fact to be so, it is made apparent by extraneous proof. The words "evince no intention" mean "evince an absence of intention." It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition, annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified but unsubstantial service. To such a case the statute would apply. Again, a condition may be such that proof beyond the deed itself would be necessary to disclose the fact whether the expressed condition was or was not substantially beneficial. We will suppose that the owner of a lot conveys it with the express condition that no building shall be erected on it for a period of ten years. It cannot be said from its terms that this condition was not reasonably intended to be, or that it was not, actually beneficial to the grantor. To such a case, no more being shown, the statute is not applicable. The court cannot declare the condition to be "merely nominal," and to "evince no intention of actual or substantial benefit." It requires that the court be further informed as to facts not disclosed by the deed, before it can declare the condition, to which the parties have solemnly agreed, to be of no legal effect. If the grantor should be found to own adjoining lands which were so improved that the erection of a building upon the granted lot would seriously impair their value and usefulness, the condition would, without doubt, be valid. On the other hand, the grantee, to defeat the condition, might show that the grantor had no actual or prospective interest in the adjoining premises, was in no manner concerned in them or in their use, and that they were unimproved. He might thus show himself entitled to the benefit of the statute, if indeed the statute confers any benefit beyond what the common law would give. We think that the court erred in disregarding the condition, in the absence of any proof that the plaintiff had no special interest in the observance of the condition. We have not overlooked the case of *Barrie v. Smith*, 47 Mich. 130, but upon this point we must decline to follow it.

The condition upon which the estate was originally granted attended it through the several succeeding conveyances. The successive purchasers bought with constructive notice of it.

If, by reason of the breach of the condition subsequent, the

plaintiff had a right to re-enter, it was not necessary that the common-law ceremony of a re-entry be performed, as a condition precedent to the prosecution of an action to recover the possession of the property: *Plumb v. Tubbs*, 41 N. Y. 442; *Cornelius v. Ivins*, 26 N. J. L. 376; *Ruch v. Rock Island*, 97 U. S. 693; *Rugge v. Ellis*, 1 Bay, 107, 111; and see Adams on Ejectment, 10. Whatever necessity there may have anciently been for such a proceeding, the reason for it ceased with the disappearance of the fictions and devices resorted to, upon which to found the action of ejectment.

The appellant asks that, if the judgment be reversed, we direct judgment in its favor upon the findings of the court. We decline to do this, for there may be other questions presented by the case, but not covered by the findings, such as that of acquiescence or waiver, and which the trial court, upon its theory of the case, did not deem it necessary to consider.

Judgment reversed.

DEEDS. — FORFEITURE FOR BREACH OF CONDITIONS SUBSEQUENT: See the extended note to *Cross v. Carson*, 44 Am. Dec. 743-759. If there is any reasonable doubt as to whether a condition or a covenant is intended by a provision in a deed, it will be construed as a covenant: *Peden v. Chicago etc. R. R. Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680. Conditions subsequent are good whenever their performance is not impossible or does not afterwards become so by the act of God, and they are not contrary to the law nor repugnant to the deed: *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682. A condition that the grant shall be void if the grantee, his heirs, or assigns, should sell or permit the sale of spirituous liquors on the premises, is valid, although such sales are not illegal: *Smith v. Burrie*, 56 Mich. 314; 56 Am. Rep. 391.

DEEDS, CONSTRUCTIVE NOTICE OF CONDITIONS IN: See note to *Whitney v. Union Railway Co.*, 71 Am. Dec. 723. As to the general rule that a purchaser is presumed to have notice of every fact which is disclosed by the records constituting the chain of title by which he holds, see notes to *Lodge v. Simonton*, 23 Am. Dec. 48-51; *Parker v. Conner*, 45 Am. Rep. 184-190.

DEEDS. — RE-ENTRY FOR BREACH OF CONDITION SUBSEQUENT is necessary to defeat an estate of freehold which has once vested, unless the party entitled to the benefit of the condition is actually in possession of the land: *Frost v. Butler*, 7 Greenl. 225; 22 Am. Dec. 199; *Spear v. Fuller*, 8 N. H. 174; 28 Am. Dec. 391; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *O'Brien v. Wagner*, 94 Mo. 93; 4 Am. St. Rep. 362. In Massachusetts this rule of the common law is deemed to have been changed by a statute regarding writs of entry, and an action for possession of the land may be maintained without actual entry: See *Stearns v. Harris*, 8 Allen, 597.

SCHUBERT v. J. R. CLARK Co.

[49 MINNESOTA, 331]

MANUFACTURER OF DEFECTIVE AND DANGEROUS ARTICLES, LIABILITY OF.

One who manufactures and puts a dangerous, faulty article in his stock for sale is deemed to have anticipated that, in the ordinary course of events, it would come into the hands of a purchaser for actual use, either directly or through some intermediate dealer, and is therefore answerable for such damages as result from such use by reason of the faulty and dangerous construction. Hence, if a painter using a stepladder is injured by its breaking because of its being made of poor, cross-grained, and decayed lumber, he may recover damages of its manufacturer, if the latter knew, or ought to have known, of its condition, and that it was dangerous to one using it, and sold it to plaintiff's employer, or to a retail dealer with knowledge that the latter would sell it.

ACTION by the plaintiff to recover compensation for injuries suffered by him from the breaking of a stepladder used by him while carrying on his occupation of a painter. The defendant was the corporation which manufactured such ladder. The plaintiff notified his employer of the necessity of having a ladder, and he ordered one of a retail dealer. The latter, not having one in stock, ordered it of the defendant, who thereupon delivered it to plaintiff, who received and used it. While at work upon it and in the exercise, as plaintiff alleged, of due care, it broke, and he fell and injured his arm to such an extent that he lost the use of it. The complaint alleged that the ladder was made of poor, cross-grained, and decayed lumber, and that the defendant knew, or ought to have known, that fact, and that the ladder was not of sufficient strength to sustain the weight of a person using it, and that neither plaintiff nor his employer nor the retail dealer knew the condition of the ladder, and that such condition was concealed by its being so oiled, painted, and varnished that a person could not discover its defects. A demurrer to the plaintiff's complaint having been overruled, the defendant thereupon appealed.

Welch, Botkin, and Welch, for the appellant.

F. D. Larabee, for the respondent.

DICKINSON, J. The sufficiency of the complaint as showing a right to recover against the defendant is here for decision. The facts of the case, as shown by the complaint, may be thus stated:—

The plaintiff, a house painter, was in the employ of one Phelps. He was engaged in the work of painting the interior of a certain building. His employer, Phelps, as a purchaser, ordered from a retail merchant a new ten-foot stepladder, directing that it be delivered to the plaintiff at the place where he was at work. The merchant, not having such a ladder in his stock of goods, ordered the defendant corporation to deliver such a stepladder to the plaintiff for his use. The defendant delivered a ladder to the plaintiff pursuant to that order. This we construe to have been a purchase by the merchant from the defendant. The defendant was a manufacturer of such goods, and the ladder so delivered had "theretofore" been manufactured by it, "to be sold for the purpose of being used. . . ." It was made of poor, cross-grained, and decayed lumber, and "was so insufficient in strength as to be dangerous to the life and limb of this plaintiff, and whoever might use the same." It is alleged that the defendant knew, or ought to have known, such defects and insufficiency. Neither the plaintiff nor his employer nor the merchant from whom the latter ordered the ladder knew such defects, and it was so varnished, oiled, and painted that they could not discover them. The plaintiff, supposing the ladder to have been made of good material, and to be of sufficient strength, proceeded to use it in the performance of his work, and while he was standing on it, seven feet above the floor, it broke without his fault, causing him to fall, and he was thereby injured.

The complaint is defective in not stating, but leaving it only to be inferred, that the ladder broke by reason of the alleged defects; but this fault is not relied upon by the appellant, and we pass it over to consider the real merits of the case.

Let us consider more particularly wherein the defendant is shown to have been guilty of a wrong towards the plaintiff, of which the latter may complain, or what legal duty the defendant owed to the plaintiff, or generally to any one who, in the ordinary course of events, might procure the ladder for use.

There was no contract relation between the plaintiff and the defendant, and hence no contract obligation for the violation of which the plaintiff can recover. Neither the plaintiff nor even his employer was a party to the contract of sale pursuant to which the ladder was delivered to the plaintiff. He did not stand in any relation of privity with the contracting parties, the retail merchant who purchased, and the defendant;

who sold the ladder. The contract was not entered into nor executed for his benefit, and if there was any breach of the contract the plaintiff has no right of action merely for that. If the defendant is liable, it must be upon the ground that the circumstances under which the ladder was manufactured and delivered were such that the neglect to disclose the existence of the defect was a wrong, a neglect of a duty recognized by law independent of contract.

Accepting the allegations of the complaint as true, we assume that by reason of the defects complained of the ladder was dangerous to the life or limb of a person using it in the way in which such articles are ordinarily used. If there was any legal duty resting on the defendant for the breach of which the plaintiff can complain it will be more apparent if the alleged negligence and consequent injury are brought into close proximity. Hence we will for the present assume that when the ladder was delivered directly to the plaintiff for his use by the defendant the latter knew the concealed defects, and had reason to apprehend that the use of it by the plaintiff, or by any one, would be attended by serious personal injury. It would constitute an actionable wrong for the defendant to thus knowingly and unnecessarily do what it had reason to suppose would result in injury to the plaintiff without the intervention of any fault or neglect on his part or on the part of any other person. If the defendant knowingly delivered such an article for the plaintiff's use, it was his duty to warn him of the danger by disclosing the hidden defects, and neglect of that duty would constitute actionable negligence. Every one may be supposed to understand that such articles are manufactured, sold, and disposed of with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, ordinarily assumes without inquiry, and without any express warranty, that it is what it appears to be, a thing intended for actual use, and that it has not been so negligently manufactured that by reason of concealed defects its use will be attended with danger of serious injury; and this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances, silence partakes of the nature of

an assurance that the thing has not any such known but concealed dangerous defect. Silence has the effect and the quality of deceit.

The following cases may be cited as instances in which, although there were no contract relations between the parties, a legal duty towards the person injured has been recognized: *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, was an action by a person whose physician had prescribed for her use as a remedy the extract of dandelion, which is a harmless drug. A druggist furnished her what was supposed to be extract of dandelion, taking it from a jar so labeled by the defendant, the manufacturer. With that label on the jar, the defendant had sold it to a dealer in drugs, from whom the druggist who dispensed it for the plaintiff's use had purchased it. In fact the jar contained extract of belladonna, a poison. The defendant was held liable for the injury suffered by the plaintiff from taking the mislabeled poison.

A similar case was that of *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, where the defendant, an apothecary, negligently sold a deadly poison, laudanum, in place of a harmless medicine, rhubarb, which had been called for. The purchaser procured it to administer to his servant. The servant having died from the effect of the poison, his administrator was allowed to maintain an action for the negligence.

In *Elkins v. McKean*, 79 Pa. St. 493, 502, it was considered that if refiners and vendors of petroleum put on the market for sale for illuminating purposes an oil which they know to be below the legal fire test, they would be liable for a death caused by the explosion of a lamp, even though the oil had been purchased from an intermediate dealer.

In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, the principle of general duty and liability, independent of contract relations, was carried very far. The defendant, knowing naphtha to be an explosive fluid, dangerous for use for illuminating purposes, sold it to a retail dealer, knowing that the latter intended to sell it for such use. The plaintiff purchased from the retail dealer for that purpose, both he and the seller being ignorant of the dangerous nature of the substance. The plaintiff was held entitled to recover for injuries suffered from its use.

The case of *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, was this: The plaintiff attended a ball, for which he had purchased a ticket. The defendant, a caterer, had been em-

played to provide refreshments for those who should attend the ball. The plaintiff partook of the food furnished by the defendant, which was alleged to have been unwholesome and poisonous. The defendant was held liable.

In *Heaven v. Pender*, 11 Q. B. Div. 503, Brett, M. R., laid down in general terms the rule of duty and liability, even in the absence of a contract relation between the parties, sufficiently broad to cover this case, and to hold the defendant to responsibility if the case were as we are assuming it to have been. While the other justices declined to adopt the general test of liability which was stated by the master of the rolls, they declared that they did not intend to express a doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

In *George v. Skivington*, L. R. 5 Ex. Cas. 1, a husband purchased from the defendant a chemical compound as a hair-wash for his wife's use. It proved to be of a harmful nature, and the wife's health was injured. She was allowed to maintain an action for the injury.

In this connection should also be cited, as recognizing a duty independent of contract relations: *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106; 24 Am. St. Rep. 194: See also Cooley on Torts, 2d ed. 560.

There is another class of cases in which the element of a contract relation was involved, but in which the conduct of the defendant in concealing or not disclosing a danger which he knew or had reason to apprehend was treated as being in the nature of a fraud or deceit. See *Marsh v. Webber*, 13 Minn. 109, 114; *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476, which were cases of the sale of domestic animals, the vendor knowing that they were infected with a contagious disease: *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, was a sale of hay to be used by the purchaser for feeding her cow, the seller (defendant) knowing, but not disclosing the fact, that white lead had been spilled upon the hay from which that sold had been taken. The defendant was held liable for the death of the cow, although he had attempted to re-

move all of the hay that had been injuriously affected, and supposed that he had done so. The opinion in this case gives prominence to the feature of the wrong in not disclosing the fact. Of such cases it may be observed that the conduct of the defendant could not be deemed thus wrongful, unless it involved the breach of a legal duty. The conclusion must rest upon and presupposes the existence of a duty, recognized as such by the law, to disclose the concealed defect, concerning which the other party is presumably ignorant. If there is such a duty, its neglect, followed by injury proximately resulting, constitutes actionable wrong.

We have heretofore assumed that the defendant knew the defects when it delivered the ladder to the plaintiff; but our statement of the case shows that such was not the fact, or at least it does not appear from the complaint that it was so. It seems from the complaint that at some time prior to the ordering and delivery of the article, the defendant, in the course of its business of manufacturing such goods, had negligently constructed this ladder for sale, but not (as we will assume in favor of the defendant) with any specific intention or anticipation as to who might purchase or use it, but only intending that it should go into its stock of goods of that kind, to be sold in the usual course of business, and thus at length come to the hands of some one who would purchase it for actual use. The defendant is to be deemed to have known the fact alleged, that the dangerous defects were concealed by the application of oil, paint, and varnish, although we do not understand that this was applied for the purpose of concealing such defects. It would seem that after that was done the defendant could not have distinguished this ladder from any other of its manufactured goods of a like kind. If, then, the defendant did not know, and could not have discovered, at the time of delivering this ladder to the plaintiff, that it was defective, there could be no wrong in not then disclosing the existence of defects in this particular article, which were neither known nor discoverable; and the question of the defendant's liability reaches back to the time of manufacturing and putting into its stock of goods for sale an article then known to be dangerously defective, the defects being concealed, and not likely to be discovered, either by any intermediate purchaser standing between the defendant and the person who might procure the ladder for use, or by the latter person. We shall assume, then, that there was no wrongful

conduct when the ladder was delivered, but only, if at all, when it was manufactured and put in the defendant's general stock for sale. In this view of the case, the wrongful conduct of the defendant and the injury resulting therefrom would be somewhat more widely separated in time and in the order of events than in the case as we have heretofore assumed it to have been; but it would not change their real relation as cause and effect, nor so qualify that relation that the law would regard the injury as being so remote from the wrong that for that reason responsibility should cease.

When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence; hence it would be difficult to distinguish such a case, in principle, from one where the transaction is directly between the wrong-doer, then knowing the danger, and the party who is injured. If any distinction is to be made it must rest upon the grounds of expediency, the arbitrary fixing of a limit to the liability of the wrong-doer; but we consider that in principle the defendant should be held to responsibility for an injury resulting proximately, and without any intervening wrongful agency, from its confessedly negligent act, which was such as to expose another to great bodily harm; and that no reason of policy forbids this. The authorities which have been cited we deem to be sufficient to justify this conclusion, although it is to be admitted that there are others tending to an opposite result.

Order affirmed.

NEGLECT, LIABILITY FOR. — As to the privity of contract required to authorize a recovery for negligence, see notes to *Peabody etc. Ass'n v. Houseman*, 33 Am. Rep. 760, and *Dealin v. Smith*, 42 Am. Rep. 315-319. Besides the cases cited in the opinion from this series, *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387, may be referred to. There a mill-owner, who contracted for the addition of a cornice to his mill, and agreed to furnish at his own cost the necessary scaffolding, was held liable for the death of the contractor's servant, caused by the fall of the scaffolding. The class of cases to which the principal one belongs may perhaps be referred to the compre-

hensive doctrine announced in *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644, where it was laid down that if a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be properly performed, shall not suffer loss or injury by reason of his negligence.

EMMERT v. THOMPSON.

[49 MINNESOTA, 386.]

SUBROGATION IS NOT FOUNDED UPON CONTRACT, but is a creation of equity existing solely for accomplishing the ends of substantial justice, and being controlled by equitable principles, will be entertained only when there is an equity to invoke and no innocent person will be injured.

SUBROGATION TO DISCHARGED SECURITIES. — One who lends money for the express purpose of taking up and discharging liens upon real property, and who discharges those liens at the request of the debtor, expecting that his securities will of record take the place of that which he discharged, is not a volunteer, stranger, nor intermeddler, and therefore, if justice requires it, may be subrogated to the lien thus discharged and allowed to assert it, as where he discharges liens in the belief that none other exist against the property, and afterwards learns of liens subordinate to those discharged which are attempted to be asserted against him as having priority to the lien taken by him upon the same property to secure his advances. Nor will the fact that the lien of which he was ignorant was of record, defeat his claim for relief.

MORTGAGES, MISTAKE IN DISCHARGING OF RECORD. — It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon record, and to fully protect them from the consequence of their acts when such relief will not result prejudicially to third or innocent persons.

ACTION by Joseph Emmert to foreclose a mortgage made in favor of H. L. Emmert upon the northeast quarter of section 14 and the west half of the southwest quarter of section 13 in the same township. B. A. Cornwell, being made a party defendant under the allegation that he was a subsequent encumbrancer, answered, alleging that in January, 1888, he loaned the mortgagor eighteen hundred dollars, secured by a mortgage on the same land; that out of the moneys so loaned he, at the request of the mortgagor, paid off and caused to be discharged certain encumbrances then existing on the same land and entitled to priority over the plaintiff's mortgage; that at the time of the loan the mortgagor represented that there were no encumbrances upon the land other than those which Cornwell discharged, and that Cornwell believed this and did not hear of the mortgage now in suit until February, 1890;

that the mortgagor was insolvent and the land mortgaged not worth more than three thousand two hundred dollars. This defendant therefore asked that he be subrogated to the securities which he had thus discharged, and that out of the proceeds of the mortgaged property he be first paid the sums paid by him. The allegations of the defendant Cornwell were found to be true and the court granted him the relief which he asked, and thereupon the plaintiff appealed.

Daniel Rohrer, for the appellant.

Warner, Richardson, and Lawrence, and Geo. W. Wilson, for the respondent.

COLLINS, J. When the loan of money was made by defendant Cornwell to defendant Marr, to secure which, as agreed upon, the latter mortgaged his entire farm, consisting of two hundred and forty acres, it was for the stipulated purpose of relieving one tract (one hundred and sixty acres) from the trust deed held by Ormsby, the balance (eighty acres) from the Hayes mortgage, and the entire farm from delinquent taxes. The trust deed, the mortgage last referred to, and the taxes were represented to be, and in fact were, first liens upon the premises; and Cornwell believed, and it was implied from what Marr stated when applying for the loan, there were no other encumbrances, and that, with these paid off and discharged, his mortgage would take their place and become the first and only charge upon the property. The taxes and the amounts due on the encumbrances, aggregating \$1,434.82, were paid out of the proceeds of the loan, in accordance with the agreement under which it was made. Proper releases and discharges were procured and at once recorded, in the mistaken belief on the part of Cornwell and the agents who transacted the business, that there was no other or prior charge upon the premises. For some time thereafter they remained in ignorance of the fact that plaintiff's mortgage was in existence and of record when the one in question was executed, and by their acts had of record become the senior lien. As Marr was and is insolvent, and the plaintiff's mortgage, with costs and disbursements of foreclosure, now exceeds in amount the value of the farm as found by the trial court, the seriousness of the situation is quite apparent. The court below subordinated the plaintiff's claim to that of defendant Cornwell, to the extent of the payments made for taxes and to satisfy

and extinguish the encumbrances, reinstating the liens in effect, and its right and power so to do is the principal question now before us.

It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity—is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependant upon contract, privity, or strict suretyship: *Stevens v. Goodenough*, 26 Vt. 676; *Harnsberger v. Yancey*, 33 Gratt. 527; *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647. That in this way a court, under a great variety of circumstances, may relieve one who has acted under a justifiable or excusable mistake of fact, is readily conceded by appellant; but he invokes and seeks to have applied to respondent's case the general rule that the doctrine of subrogation will not be exercised in favor of a volunteer or a stranger who officiously intermeddles, such as a person who pays without any obligation so to do, or one who, without any interest to protect, liquidates the debt of another. There are a very respectable number of cases, several having been cited, in which relief has been refused under circumstances precisely like those now before us, where one who has loaned and used his money in good faith, and for the express purpose of relieving a debtor from a pressing obligation, and his real property from a specific lien for the amount of the same, under a genuine but excusable misapprehension as to the rank and position of security taken by him on the same property, has been treated and characterized as a volunteer, a stranger, and an officious intermeddler, and denied the rights of an equitable assignee. But of late years, with the development of the principles on which the doctrine is founded, the courts have been taking a broader and more commendable view of the situation of such a party, and at this time very little is left of the views expressed in the earlier cases. The better opinion now is that one who loans his money upon real-estate security for the express purpose of taking up and discharging liens or encum-

branches on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing in good faith that his security will of record be substituted in fact in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or encumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor. Of the many authorities on this, we cite: *Tradesmen's Building and Loan Ass'n v. Thompson*, 32 N. J. Eq. 133; *Gans v. Thieme*, 93 N. Y. 225; *Sidener v. Percy*, 77 Ind. 241; *McKenzie v. McKenzie*, 52 Vt. 271; *Cobb v. Dyer*, 69 Me. 494; *Lery v. Martin*, 48 Wis. 198; *Detroit etc. Ins. Co. v. Aspinall*, 48 Mich. 238; *Crippen v. Chappel*, 35 Kan. 495; 57 Am. Rep. 187; 3 Pomeroy's Eq. Jur., sec. 1212; Harrison on Subrogation, secs. 811, 816; Dixon on Subrogation, 165.

It is contended by appellant that Cornwell must, under the circumstances, be declared culpably negligent when taking his security and discharging of record the Ormsby and Hayes liens; and, further, that as the plaintiff's mortgage was then of record, he had notice of it, in contemplation of law, and could not have been misled or mistaken. Marr's application for a loan was for the avowed purpose of taking up and discharging the Ormsby and Hayes liens, and was well calculated to convey the impression that these were the only encumbrances. He intentionally or otherwise concealed the truth, omitting to state the existence of a junior encumbrance in a large amount, a knowledge of which would have ended at once all negotiations with Cornwell's agents. It was misleading, and the persons last named were not negligent because they, to some extent, relied upon and were misled by it. See *Newell v. Randall*, 32 Minn. 171; 50 Am. Rep. 562.

It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon the record, and to fully protect them from the consequences of their acts, when such relief will not result prejudicially to third or innocent persons: *Gerdine v. Menage*, 41 Minn. 417. Paraphrasing slightly a remark made in the opinion therein, it may be said that, considering this case as it stands between the appellant and respondent Cornwell, it is obvious that it would be most unjust and inequitable not to place the parties *in statu quo* with respect to the amounts paid out upon liens which were superior to that held by plaintiff, now being foreclosed. It is

true that at the outset the mistake grew out of an error in the abstract books kept by Cornwell's agents; but later, when examining the records in the office of the register of deeds, the error was unnoticed and the mistake undiscovered. It was a mistake of fact, and in our judgment, not of such a character as to bar the respondents' claim to equitable relief. That in a proper case of mistake of fact such relief may be afforded, notwithstanding the intervening mortgage was of record when the error was committed, is well settled: *Geib v. Reynolds*, 35 Minn. 331. Cornwell misunderstood and was justifiably ignorant of the facts, and acted through his agents upon the assumption that he and they knew the true state of the title when the liens which his money had discharged were satisfied of record, and plaintiff's mortgage advanced to the position of the senior encumbrance, without a single act of his, and to the very great detriment of the person who had brought it about. The court was right in applying the principle of subrogation, or "equitable assignment," as it is frequently called.

Judgment was entered below, directing that the premises be sold, on foreclosure of plaintiff's mortgage, as one farm; and that out of the net proceeds there be first paid to respondent Cornwell the sums of money which he paid out as taxes, and to take up and satisfy the encumbrances before mentioned. The appellant's counsel distinctly approves that part of the judgment which requires a sale of the premises as an entirety, but makes the point, in case we affirm the action of the trial court on the main question, that the farm should have been sold subject to the subrogator's lien for a specific sum on the 160, and for another specific sum on the 80-acre tract, and thus there would have been avoided the possibility, which he now suggests, of having shifted over upon one of these facts, to some extent, a burden which ought to wholly rest upon the other.

It is evident from the record that the attention of the trial court was not called to this point, and hence the order that the sale be of the whole as one body of land; but we are unable to see how the result now suggested by counsel would have been avoided by the adoption of his plan without selling the tracts separately, keeping the funds derived from each distinct, and applying the same to the liquidation of the liens so far as they might go. Counsel does not contend that the two tracts of land should have been sold separately, but, as before stated, indorses the judgment directing a sale *en masse*.

He is concluded on this point by his position as to the manner of sale.

Judgment affirmed.

SUBROGATION — UPON WHAT FOUNDED. — The doctrine of subrogation is founded on the principles of equity and does not grow out of the contract relation: *Spaulding v. Harvey*, 129 Ind. 106; 28 Am. St. Rep. 176, and note with the cases discussing this subject collected.

SUBROGATION TO DISCHARGED LIENS. — Where a debtor by false representations induces a person to advance money to pay off liens on the debtor's property and to redeem the property from execution sale, such person will, as against the debtor, be subrogated to the rights of the persons whose liens his money discharged: *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note; *Texas Land etc. Co. v. Blalock*, 76 Tex. 85.

MORTGAGES — DISCHARGE OF BY MISTAKE. — **RELIEF AGAINST:** See extended note to *Young v. Shaner*, 5 Am. St. Rep. 703-708, where the subject is fully discussed.

SPARROW v. POND.

[49 MINNESOTA, 412.]

REAL PROPERTY, WHAT IS. — **FRUCTUS NATURALES** in which are included the fruit of trees, perennial bushes, and grasses growing from perennial roots are, while unsevered from the soil, considered as pertaining to it and a part of the realty. If a tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, it and its products cannot be regarded as emblements though the manuriance and labor of the owner aid their growth and production.

EXECUTION, WHAT SUBJECT TO. — **BLACKBERRIES GROWING ON BUSHES** are not subject to execution as personal property, though a statute of the state authorizes the levy of the writ upon unharvested crops.

ACTION to recover possession of certain unpicked blackberries. The plaintiff's title was founded upon a sheriff's sale made upon the theory that the berries, though still upon the vines, were personal property and subject to sale as such. The bushes upon which the berries grew were planted some four years before the levy and sale, and the land upon which they were so planted was a part of the defendant's homestead. The bushes were in rows five feet apart and were cultivated and hoed in the same manner as corn. The trial court, on the defendant's motion, directed a verdict and judgment to be entered in his favor and the plaintiff thereupon appealed.

S. T. Littleton, for the appellant.

Robert Taylor and Samuel Lord, for the respondent.

MITCHELL, J. At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man, termed "emblemments," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death.

This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes, and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life: 4 Kent's Com., p. *73; 4 Bacon's Abridgment, 372, tit. "Emblemments"; Freeman on Executions, sec. 113; 1 Schouler on Personal Property, sec. 100 et seq.; *State v. Gemmill*, 1 Houst. 9; *Craddock v. Riddlesbarger*, 2 Dana, 205; 4 Am. & Eng. Ency. of Law, tit. "Crops"; *Rodwell v. Phillips*, 9 Mees. & W. 501.

A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels and subject to sale as such. The ground upon which this seems to be held is, that although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham v. Atwood*, Cro. Car. 515. See *Frank v. Harrington*, 36 Barb. 415.

It is sometimes stated that the test whether the unsevered product of the soil is an emblemment, and as such personal property, is whether it is produced chiefly by the manurance and industry of the owner; but while this test is correct as far as it goes, it is incomplete. Under modern improved methods all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees was subject to levy as personal property. No doubt all emblemments are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner as well as purpose of planting is an essential element to be taken into consideration. If the purpose of planting is not

the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblems." On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblems would not attach: Darlington on Personal Property, 26.

This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts, unless hops be an exception, and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree.

It seems to us quite clear that at common law such berries, while growing upon the bushes, were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of 1878 Gen. Stats., c. 66, sec. 315, was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested.

The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblems," and neither of them included fruits or perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case.

To prevent misapprehension hereafter, it may be well, however, to say with reference to the question whether crops

growing upon a homestead under the statutes of the state are subject to levy, or whether their seizure would be an interference with the beneficial use and control of the homestead by the debtor, that it is not determined, as counsel for appellant assumes, by the case of *Erickson v. Paterson*, 47 Minn. 525. In that case the grain grew upon land entered under the United States homestead law, by the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and use as a home.

Hence that case would not necessarily control the question discussed in the present case.

Judgment affirmed.

REAL PROPERTY — WHAT IS. — Vegetable productions growing on land are a parcel of it, but on severance become mere chattels belonging to the owner of the inheritance, unless severed and removed at the same time, when they are regarded as part of the land: *Coombs v. Jordan*, 3 Bland's Ch. 284; 22 Am. Dec. 236.

EXECUTION — WHAT SUBJECT TO. — Growing crops, when *fructus industriales* are personal property and as such are subject to execution: *Edwards v. Thompson*, 85 Tenn. 720; 4 Am. St. Rep. 807, and note; note to *Barrett v. Choen*, 12 Am. St. Rep. 366. As to what growths or crops are subject to execution as personalty: See extended note to *Norris v. Watson*, 55 Am. Dec. 161. Standing grass is not subject to execution: *Rogers v. Elliott*, 59 N. H. 291; 47 Am. Rep. 192, but growing corn is a chattel and subject to execution: *Thompson v. Craigmyle*, 4 B. Mon. 391; 41 Am. Dec. 240, and note; *Whipple v. Foot*, 2 Johns. 418; 3 Am. Dec. 442. Growing fruits and crops might be sold under a *fi. fa.* at common law: *Coombs v. Jordan*, 3 Bland's Ch. 284; 22 Am. Dec. 236.

ALLEN v. AMERICAN BUILDING AND LOAN ASS'N.

[49 MINNESOTA, 544.]

CORPORATIONS. — THE WRONGFUL AND IRREGULAR SALE OF THE STOCK of a stockholder made by a corporation is a conversion by it of such stock for which an action can be sustained against it by the owner, though if he had elected to do so, he might have treated such levy as invalid, and, by paying the dues for which the stock was irregularly sold, have reinstated himself as a stockholder as completely as if the pretended sale had not been made.

CORPORATIONS — STOCK, IRREGULAR SALE OF, WHEN NOT RATIFIED. — The receipt by stockholders of the surplus resulting from an irregular and invalid sale of their stock made by the corporation, does not ratify such sale and estop them from maintaining an action for conversion, if at the time of such receipt, they did not know that the sale had been conducted irregularly and with such failure to observe the by-laws and

rules of law upon the subject that it was invalid. The stockholders, if they had no notice of any irregularities, were not under obligation, before accepting the surplus proceeds, to investigate the proceedings culminating in the alleged sale, to ascertain whether they were regular and valid. They had the right to act on the presumption that the corporation and its officers had properly performed their duties. Nor were the stockholders bound to return the sums received before commencing action against the corporation for the conversion of their stock.

ACTION against a corporation to recover the value of shares of stock sold by it and which at the time of the sale belonged to plaintiff and his assignors. While he and they were in default in the payment of their dues, the corporation sold their stock at auction without giving any notice of the sale to the stockholders or otherwise. The by-laws required notice of all intended sales of stock to be mailed to the owner thereof at least ten days before the date of the sale. The trial court decided that those of the stockholders who had received the surplus proceeds of the sale, as stated in the opinion of the court, had thereby ratified such sales, and therefore that there could be no recovery on their account, but that the rule was otherwise with respect to those who had refused to receive or retain such surplus.

Lusk, Bunn and Hadley, for the appellant.

Rea and Hubachek and Chas. M. Cooley, for the respondent.

COLLINS, J. It was held by the court below, and stands undisputed here, that the sales of stock then owned by plaintiff's assignors in defendant corporation were unlawful and indefensible, because the power to sell was improperly and defectively exercised. A by-law of defendant association, also made one of the terms and conditions of the stock certificates, as the same were printed and issued, requiring and providing for a sale of public auction, in case of a failure to meet the prescribed monthly payments for a period of six months, was ignored and disregarded, to the extent that the sale was in the directors' room in the offices of the corporation, and no open, public, or general notice of the same was ever given. By the same by-law it was also provided that whenever any stock was to be sold for arrearages in the monthly payments, a notice should be mailed to the owner of the stock ten days, at least, before the day of sale, stating the time and place of such sale. This express and important provision was also ignored and disregarded, and the sales made without any

attempt to notify stockholders in default, by mail or in any other manner. Hence the conclusion of the trial court that the sales were irregular and unlawful. The defendant association bid in all stock for which no greater sum was offered than the amount due for monthly payments and fines, and, under the by-laws, this amounted to a cancellation of the stock thus sold; all money standing to the credit thereof, in what was styled the "Loan Fund," and which was five sixths of the sums theretofore paid in by the stockholder, and all fines, immediately becoming profits for remaining members. As to this stock, it was held below that there still existed and remained with the derelict stockholders the right to make payment to defendant association of such sums of money as might be necessary to place the stock in good standing, thus reinstating the holders as completely as if the pretended sale had not been made; and that without such payment of arrearages, or a tender of payment, followed by a refusal or wrongful act of the association, no action to recover the stock or its value would lie.

When an amount was bid for the stock, at the sale before mentioned, in excess of the sums due for monthly payments and fines, the same was sold to an individual, and thereupon it was transferred upon the books of the association to the name of the purchaser. The association then sent its check to the original stockholder by mail for the amount of such excess. These checks severally referred to the number of the certificate of the stock sold, and purported to be on account of what was due as excess or surplus arising from a sale at auction of the stock of the persons to whom the checks were made payable. They were received by the proper parties, who proceeded to collect the money thereon, and to retain the same, with a single exception. One stockholder declined to accept and promptly returned the check. It was determined below that, with the exception mentioned, the stockholders whose shares were purchased by individuals had expressly ratified the sale, waived its irregularities, and rendered it valid. The right of plaintiff, as the assignor of these stockholders, to recover as for a conversion of the stock shares, was denied, on the sole ground that the sale and its consequences, which under the by-laws was a transfer of the stock to the purchaser upon the defendant's books, and the total exclusion of the original owner, had been acquiesced in and ratified by such of the stockholders as had received and kept sums of

money derived at a sale of their stock for delinquencies well known to them; and this view was followed up and emphasized by directing a recovery against the defendant to the extent of the value, at the time of the sale, of the shares held by the party who refused to accept a check for the alleged surplus.

The first inquiry of consequence here is as to the rights of the plaintiff, solely as the assignor of persons whose stock was bid in by the association. His rights are those of his predecessors in interest, and if an action for the conversion of their stock, or one in the nature of a special action on the case for a wrongful interference with their rights as stockholders, could have been maintained by them after the pretended sale, and prior to the assignment, that remedy is the plaintiff's, and may be exercised by him. His counsel do not seriously contend that in a case of this character a payment or tender of the delinquent amounts could not have been made, and in case of a refusal on the part of the association, an action would not lie to restore the stock and its owner to good standing in that body; but their contention is that as the association has asserted and insisted upon the regularity and validity of the sale of all the stock, and that by reason of the same the title has been absolutely divested, and the original owners deprived of all interest therein, or in the body corporate, they may take the latter, if they choose, upon the ground it has elected to occupy, and recover from it in the same manner and to the same extent as if the sales had been made and the title transferred upon the books to a third party, as was the case with reference to a portion of the stock. This position would be unassailable if the property in question was anything but stock shares, and the defendant anybody but the corporation issuing the same; and we are unable to discover any good reason for saying that a valid distinction can be made between the situation here and any other in which an agent or a pledgee has improperly appropriated his principal's property to his own use. The fact that the right to follow and recover the property itself can be exercised does not stand in the way of an action to recover its value, if the owner elects to pursue that remedy. He may have a choice of remedies, but we cannot see why he may not adopt the one selected by plaintiff as to that part of the stock bid in and appropriated by the association itself, if he has that power as to the stock which it caused and permitted to be bid in and appropriated by third

parties. It is certainly immaterial to the corporation which course is followed, for in one case the stock itself would be recovered, in the other its value only. When the elements exist which are essential to authorize or constitute an action for conversion of shares of stock, or one in the nature of a special action on the case, it must, on principle, be wholly immaterial who has become the purchaser at a sale, or whether it sold for the amount due as arrearages, and for which the corporation had a lien, or for more than that amount. The right of action in either case is founded upon the fact that there has been a distinct act of dominion wrongfully exercised over the stockholder's property, inconsistent with his right and in denial of it. The defendant practically deprived the owner of his stock, and the advantages accruing from its ownership, by bidding it in for itself. This was an act of interference, subversive of the right of the stockholder to enjoy and control the stock, and may be treated by him as a conversion of his property: See Morawetz on Corporations, secs. 208, 567; Cook on Stocks and Stockholders, sec. 576; and 1 Lawson, Rights, Remedies and Practice, sec. 466, with the cases cited on the subject.

Our next inquiry is in reference to the claim that such of plaintiff's assignors as received and cashed defendant's checks for the excess or surplus must be regarded as having acquiesced in and ratified the irregular sales. That, with knowledge of all material facts as to the irregularities, these delinquent stockholders might acquiesce in and ratify, and thereby estop themselves from questioning the validity of the sales, is admitted by appellant's counsel. Their contention is, however, that from the undisputed facts it clearly appears that the stockholders were ignorant of the invalid acts referred to, and that solely by reason of the remittances it cannot be held that the stockholders had constructive notice of the various irregularities of which the plaintiff complains, and with this notice accepted the defendant's money. It is true that the stockholders knew, or should have known, that they were in arrears with their monthly payments, and that by reason thereof the right had accrued to the association to sell their stock. It is also true that when receiving the checks they were informed of the claim that this right had been exercised, and sales made, by means of which their stock had been disposed of by the corporation, and they, as stockholders, had been ousted from membership therein; and they were also

aware of the fact that no notice had been received by them of the time and place of sale, as provided for in the by-laws, through the mails or otherwise. But there was nothing in this which suggested that the association had totally failed to observe the very wholesome and essential requirements of the by-laws when the power to sell was exercised. The very natural presumption in such a case would be that the officers of the corporation had properly performed their duty, and had conducted a public competitive sale in a place and in such a manner as would attract attention, and tend to promote competition; in a word, that the stock had not been sold in privacy, but at public auction. On this presumption the owners had a right to rely until the material facts which overthrew it came to their knowledge. The court below was in error when saying, as it did in substance, that it was incumbent upon the stockholders, knowing when they appropriated the proceeds of the checks that the prescribed notice to which they were entitled had not come to their hands, to forthwith inquire into the manner and regularity of the sale; and that neglect and omission to make further inquiry amounted to a ratification of the same. The reception of these checks, with the knowledge before mentioned, did not impose the duty upon the stockholders of promptly investigating the proceedings of the defendant's officers, when pretending to satisfy its liens upon the stock for arrearages and fines, nor can their acquiescence and ratification of the omissions and irregularities be presumed from the bare fact that they received and retained the money: *Combs v. Scott*, 12 Allen, 496; Story on Agency, sec. 239, note.

All this was done when there were no circumstances in the possession of the stockholders which would excite suspicion or suggest investigation, and when they were in ignorance of the material facts, knowledge of which was essential to a ratification. The trial court erred when it declared that if the stockholders chose to treat the sale as valid, and to make no inquiries when receiving their checks, there was a ratification which would bind them in the absence of active concealment, misrepresentation, or artifice on the part of the association, calculated to deceive them and prevent scrutiny; and, as before intimated, it was error to hold that an action of the character of the present one could not be maintained as to the stock which was bid in, purchased in effect by the defendant itself. The remedies are cumulative in such cases.

By the counsel for respondent it has been argued that upon discovering the unlawfulness of the sales, it was incumbent upon the stockholders or the plaintiff to promptly disaffirm, by returning, or offering to return, the defendant's money paid over as alleged surplus, and that its retention, after learning the facts, amounted to a ratification. Retaining the money in silence and without objection for an unreasonable length of time, with knowledge of the material facts, might be regarded as a ratification by acquiescence; but this was a transaction between parties standing as to the stock to be sold for delinquencies, in the relation of principal and agent, or pledgor and pledgee. Disregarding the obligation resting upon it as agent or pledgee, the association unlawfully and wrongfully converted the stock shares to its own use, under the pretense of a sale, and for this tort an action to recover damages has been brought. The amounts remitted to the stockholders on account of this unauthorized sale of the stock would simply serve, upon a proper showing, to reduce the amount of plaintiff's recovery. Certainly the law would not require the absurd and idle ceremony of tendering or returning the amount of the remittances in order to avoid the charge of having ratified the transaction, and as a foundation or condition to the bringing of an action to recover it in the way of damages.

Judgment reversed, and case remanded, with directions to enter judgment for plaintiff against the American Building and Loan Association as demanded.

Application for reargument denied June 29, 1892.

CORPORATIONS—STOCK—FORFEITURE AND SALE FOR NON-PAYMENT OF ASSESSMENTS.—A corporation has no inherent right to forfeit or sell shares of stock owned by delinquent stockholders. Such power can be exercised only when it is expressly conferred by statute: *Budd v. Multnomah etc. Ry Co.*, 15 Or. 413; 3 Am. St. Rep. 169. In this case is discussed also the liability of the corporation for conversion, and the measure of damages therefor. Any power given to forfeit stock must be strictly pursued, and if any restrictions have been disregarded, the forfeiture is invalid: *Germanatown etc. Ry Co. v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546, and note; and a sale of stock for an illegal, or partially illegal, assessment is invalid: *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236, and note; note to *Smith v. Mariner*, 68 Am. Dec. 88.

JOANNIN v. OGILVIE.

[49 MINNESOTA, 564.]

DURESS OF PROPERTY, PAYMENT UNDER. — When one, in order to recover possession of his personal property from another who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, if made under protest, is deemed to have been made compulsorily, and may be recovered back, at least, where such detention is attended with circumstances of hardship and serious inconvenience to the owner.

DURESS OF REAL PROPERTY, RECOVERY OF PAYMENT MADE UNDER. — If an invalid and unfounded claim for a lien upon real property is filed, and its owner is so pressed for money that he must obtain a loan, and such loan cannot be procured until such lien is cancelled, and the claimant, knowing these facts, refuses to cancel it until paid the amount thereof, which the owner is therefore obliged to pay to secure the loan, the money so paid is paid under duress and may be recovered.

ACTION upon a promissory note. The defendant did not deny his liability on the note, but pleaded a counterclaim, in which he alleged that, while erecting certain buildings, he had purchased materials of one Thompson, a retail dealer, and had paid for them; and that the plaintiffs, claiming that Thompson had purchased these materials of them, and that he was a contractor with defendant, filed for record a lien statement claiming that there was due them from Thompson \$682.50, and that this sum was a lien on defendant's buildings and premises; that defendant was at the time largely indebted, and was negotiating a loan for \$15,000, to be secured by a mortgage on his property, and it was impossible to procure such loan unless the alleged lien was removed; that plaintiffs refused to remove it unless Thompson's debt was paid, and the defendant was therefore obliged to pay it, which he did, under protest, and he now asked that the sum so paid be allowed him as a counterclaim. The trial court sustained defendant's claim, and the plaintiffs thereupon appealed.

H. F. Greene and John H. Brigham, for the appellants.

J. B. Richards, for the respondents.

MITCHELL, J. The findings in this case are so specific as to constitute a sufficient statement of the facts, and an examination of the record satisfies us that, on all material points, they are fully justified by the evidence.

That plaintiff's claim of a lien on the land of the defendant Ogilvie was wholly unfounded is conceded: *Merriman v. Jones*, 43 Minn. 29. Therefore the only question is whether

the payment of the claim was voluntary, or whether it was made under such compulsion or constraint that it is to be deemed in law involuntary, so that the money may be recovered back.

In examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoiding of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand and with the great liberality of the equity rule on the other. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence; and the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force.

The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice: Pollock on Contracts, 556.

In *Fergusson v. Winslow*, 34 Minn. 384, this court held that "when one in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back, at least when such detention is attended with circumstances of hardship or serious inconvenience to the owner."

Again, in *De Graff v. Ramsey Co.*, 46 Minn. 319, it was said: "There is a class of cases where, although there be a legal remedy, a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice; where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him to comply with the illegal demand. In such cases, his act will be deemed to have been done under duress, and not of his free-will." *Fargusson v. Winslow*, 34 Minn. 384; *State v. Nelson*, 41 Minn. 25; and *Mearkle v. County of Hennepin*, 44 Minn. 546, are instances where the danger of irreparable or serious prejudice was considered so great and the legal remedy so inadequate as to practically leave the party no choice but to comply with the illegal demand, and hence to render the payment involuntary. It may be stated generally that whenever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience: *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatch. 297.

As was said as long ago as *Astley v. Reynolds*, 2 Strange, 915, "plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be when the party has his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

It has been said that, to constitute a payment under duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money": *Brumagim v. Tillinghast*, 18 Cal. 265; 79 Am. Dec. 176; *Radich v. Huchins*, 95 U. S. 210.

Beyond these and similar statements of general principles, the courts have not attempted to lay down any definite and

exact rule of universal application by which to determine whether a payment is voluntary or involuntary. From the very nature of the subject, this cannot be done, as each case must depend somewhat upon its own peculiar facts. The real and ultimate fact to be determined in every case is whether or not the party really had a choice—whether “he had his freedom of exercising his will.” The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line. For example, payment of an illegal tax, in order to prevent issuing a warrant of distress in the nature of an execution, and upon which the party has no day in court or opportunity to defend, is held not voluntary. Such were the cases of *Board of County Comm’rs v. Parker*, 7 Minn. 267, and *Preston v. Boston*, 12 Pick. 7. So, also, the payment of an illegal demand in order to obtain possession of personal property detained otherwise than by judicial process, and where the immediate want of the property was so urgent that an action of replevin “would not do the owner’s business.” Such was the case of *Fargusson v. Winslow*, 34 Minn. 384. Also the payment of an illegal tax in order to get a deed on record, as in the case of *State v. Nelson*, 41 Minn. 25; or the payment of illegal fees in order to secure the exercise of its jurisdiction by the probate court in the administration and settlement of an estate, where the delay was liable to result in serious loss, as in the case of *Mearkle v. County of Hennepin*, 44 Minn. 546.

On the other hand, it is well settled that the mere refusal of a party to pay a debt or to perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities. Such was the case of *Cable v. Foley*, 45 Minn. 421; also *Miller v. Miller*, 68 Pa. St. 486; *Hackley v. Headley*, 45 Mich. 569; *Goebel v. Linn*, 47 Mich. 489; 41 Am. Rep. 723; and *Silliman v. United States*, 101 U. S. 465, cited by plaintiff. It will be noted that in the last case referred to the party entered into the new contract, not for the purpose of obtaining possession of his property (the barges), but to secure payment of money due him from the government.

So, also, the fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand, will not render its payment compul-

sory, at least in the absence of fraud on part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Cush. 125; 54 Am. Dec. 716; *Taylor v. Board of Health*, 31 Pa. St. 73; 72 Am. Dec. 724; *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. 297.

Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the state. To this class belong the following cases cited by plaintiffs: *Cook v. Boston*, 9 Allen 393; *Emery v. Lowell*, 127 Mass. 138; *Mays v. Cincinnati*, 1 Ohio St. 268; *Custin v. City of Viroqua*, 67 Wis. 314.

The same has been held as to money paid under threats of distress for rent, in the absence of fraud or any other fact, except that no rent was due. The theory seems to be that the party's remedy is to replevin, and try the question of liability at law. Such was the case of *Colwell v. Peden*, 3 Watts, 327, also cited by plaintiffs.

But all these cases in which the payment was held voluntary are clearly distinguishable from the case at bar. The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need.

It was this active interference with the property, and not the necessitous financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have inter-

posed his defense in these proceedings; but this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it; but with a large indebtedness hanging over him, an overdue mortgage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, thirteen thousand dollars of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of *Fergusson v. Winslow*, 34 Minn. 384, but that the payment would be held to have been made under duress; but while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property.

It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary; but this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattles; but the question in all cases is, was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattles, or of real property, or of the person: *Fraser v. Pendlebury*, 31 L. J. Com. P. 1; *Pemberton v. Williams*, 87 Ill. 15; *Close v. Phipps*, 7 Man. & G. 586; *White v. Heylman*, 34 Pa. St. 142; *State v. Nelson*, 41 Minn. 25.

Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover

back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

Judgment affirmed.

DURESS—PAYMENT MADE UNDER—RECOVERY BACK OF MONEY.—Where a party has control of the property of another and refuses to surrender it to the use of the owner except upon compliance with an unlawful demand, money paid by the owner to emancipate his property is to be regarded as paid under duress: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202. A payment, to be regarded as made under duress, must be made to relieve the person or property from an actual and existing duress imposed by the party to whom the money is paid: *Vick v. Shinn*, 49 Ark. 70; 4 Am. St. Rep. 26, and note; *Elston v. Chicago*, 40 Ill. 514; 89 Am. Dec. 361, and note; *Mayor v. Lifferman*, 4 Gill, 425; 45 Am. Dec. 145, and extended note; see also extended note to *Peters v. Railroad Co.*, 51 Am. Rep. 820. Money paid under a moral compulsion to obtain property improperly detained is paid under duress: *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ROSENKRANZ *v.* LINDELL RAILWAY COMPANY.

[108 MISSOURI, 9.]

NEGLIGENCE IN DRIVING STREET-CAR OVER CHILD, QUESTION FOR JURY, WHEN. — Where a child four years of age, in crossing a street at an hour when there is sufficient light to see him distinctly half-way across the street, falls about four feet in front of a horse attached to a street-car and is run over and injured, and the evidence shows that the driver of the car knew that the street at the place where the accident happened was much frequented by children; that the car could have been stopped within two feet, and that the driver was giving no attention to the track in front of him, and did not see the child before the car passed over him, the question of the negligence of the railway company is properly submitted to the jury.

CONTRIBUTORY NEGLIGENCE, PARENTS OF INFANT CHILD NOT CHARGEABLE WITH, WHEN. — Where the parents of a child four years old, living in a house twenty-five feet back from the street, are poor, and dependent on their labor for a livelihood, the father being sick in a hospital and the mother having to care for two small children in addition to her household duties, and the mother leaves such child on the doorstep of the house eating bread and milk, and goes into the house to get him more food, but on returning in a few minutes finds that he has disappeared, and immediately starts to look for him, but meets persons carrying him home already injured by being run over by a street-car, it cannot be held, as matter of law, that the mother was guilty of contributory negligence.

MEASURE OF DAMAGES, INSTRUCTION AS TO, SUFFICIENTLY CLEAR, WHEN. — In an action by a minor for personal injuries, an instruction to the jury that if they found for the plaintiff they should "assess his damages at such a sum as they may believe, from the evidence, will be a fair compensation to him: 1. For any pain of body or mind; 2. For any loss of earnings after he shall have attained the age of twenty-one years; 3. For any physical disfigurement or deformity; 4. For any permanent injury to his body, other than disfigurement and deformity, which the plaintiff has sustained or will hereafter sustain by reason of said injuries and directly caused thereby," is not so wanting in clearness or perspicuity as to confuse or mislead the jury.

PROSPECTIVE DAMAGES FOR IMPAIRMENT OF EARNING CAPACITY OF MINOR ALLOWABLE. — In an action by an infant four years of age for personal injuries, the jury may take into consideration his prospective loss of earnings after he shall have attained his majority, although he has never earned anything, and no one can tell with any certainty what his future earning capacity will be.

ACTION for personal injuries. The opinion states the case.

Alexander Martin and Boyle, Adams and McKeighan, for the appellant.

A. R. Taylor and Alexander Young, for the respondent.

MACFARLANE, J. This action was brought by plaintiff, a minor, by his next friend, against the defendant, a horse-car railroad company in St. Louis, to recover damages for injuries received on the sixteenth day of February, 1888, by the alleged negligence of the defendant.

The charge of negligence made in the petition was, in substance, that the plaintiff was knocked down and run over by one of defendant's cars and horse attached thereto, while the plaintiff was crossing Chouteau Avenue, at a point where said avenue passes house No. 2313; that he was seriously and permanently injured thereby, and that he was so knocked down and injured through the negligence of defendant and its servants in charge of said horse-car. It was also charged that the driver of the car neglected to observe the requirements of a certain ordinance of the city regulating the operation of street-cars in failing to keep a vigilant watch for children who might be on the track, and in failing to stop the car in time to avoid injuring plaintiff. It is further alleged that plaintiff's arm was broken in two places, his skull broken, his face and jaws crushed, and disfigured for life.

The defendant, in its answer, denies the allegation of the petition, sets out the names of the parents of plaintiff, and alleges that the supposed injuries of the plaintiff were caused by the negligence and want of care of plaintiff and his said parents. To this answer the plaintiff replied denying the allegation of counter negligence, and admitting the parentage of plaintiff as alleged.

It appears from the evidence that plaintiff at the time of his injuries was four years of age, and lived with his parents in the rear of 2311 Chouteau Avenue, on the north side. The family consisted of father, mother, plaintiff, and a younger child. They occupied two rooms in a yard back from the street. A narrow alley or hallway connected the yard with

the street. On this street were two horse-railway tracks operated by defendant. The father of plaintiff on the date of the accident was in a hospital sick. The mother and plaintiff had spent the afternoon at the hospital with the father, and on their return home, between six and seven o'clock, the mother gave plaintiff some milk and bread, and he sat on the doorsteps to eat it. Soon after she directed a neighbor boy to take a bucket and go across the street to a saloon, nearly opposite the entrance to the passway, and get some beer. She then went into the house to get something more for plaintiff to eat, and while she was gone he followed or went with the boy across the street to the saloon. As they returned, the older boy with the beer passed over the street, and the plaintiff, following, fell upon one of the railway tracks, about four feet in front of the horse drawing one of defendant's cars, and the horse and car passed over him, inflicting severe injuries.

Upon the trial, the jury returned a verdict for plaintiff for three thousand five hundred dollars, and judgment was rendered accordingly, from which defendant appealed.

To reverse the judgment defendant insists on three points: 1. Insufficiency of the evidence to authorize the verdict; 2. Contributory negligence on the part of the parents of plaintiff; and, 3. Improper instructions defining the elements of damage, to be taken into account by the jury in making their verdict.

The questions of the negligence of defendant, and the contributory negligence of plaintiff's parents, were submitted to the jury upon instructions with which no fault is found, and the judgment cannot be disturbed, for the first two assignments of error, unless there is no substantial evidence of negligence on the part of defendant, or unless the evidence shows, as a matter of law, that there was negligence of the parents of plaintiff which directly contributed to his injury.

1. Did the evidence justify the verdict? Defendant's counsel condenses the evidence into the following summary and insists that it is insufficient to support the verdict: 1. The plaintiff at the time of receiving the injury in question was crossing the street between six and seven o'clock P. M., on February 16th, necessarily after dark. 2. The plaintiff was so crossing the street at about the middle of a block, a good distance away from regular crossings, where the driver of defendant's car would not naturally be looking for pedestrians. 3. The plaintiff started from the sidewalk on one side of the

street in a run, and ran suddenly and quickly across the street in front of plaintiff's car. He was only four feet in front of the horse when he stumbled and fell, running fast at the time. 4. There is no evidence that the driver saw the boy until he fell, when every possible exertion was made to avoid running over him. 5. The horse was going at the time on a "slow trot."

Whatever may be said of the sufficiency of the evidence, as summarized, we think some important facts are omitted. The evidence also tended to prove that there was sufficient light to enable one to see the child distinctly half across the street; that the street at this point was much frequented by children which was known by the driver of the car; that the car could have been stopped within a distance of two feet; that the driver never saw the child at all, before the car passed over him; and that the driver was giving no attention to the track in front of him.

Supplementing the summary given by defendant with these facts, we think it very clear that the issue of negligence was properly submitted to the jury. The street was a public highway open to the use of all persons, children as well as adults, at all places and not alone at intersections and crossings of other streets. This point on the street being much frequented by children demanded the greater vigilance on the part of the driver, and the fact that it was growing dark did not release him from watchfulness and caution, but rather demanded increased vigilance. Whether the driver exercised such care as was required of him in the circumstances, was submitted under instructions to which no objections are made.

2. The same, we think, may be said of the contributory negligence of the parents of plaintiff. The court instructed the jury on this question, in substance, that if the parents of plaintiff, having him in charge, considering their circumstances in life, knowingly or negligently allowed him to stray upon the streets where defendant's cars were constantly running, and where plaintiff received the injuries complained of, such facts show culpable carelessness on their part, and constitute such contributory negligence as will prevent a recovery in this action unless, notwithstanding such negligence on their part, the defendant's driver might have prevented the injury to the child by the exercise of ordinary care and diligence in keeping watch, and stopping the car as required by other instructions of the court.

The evidence showed that the parents of plaintiff were poor people, who depended upon their own labor for a livelihood. The father was at the time sick in a hospital, and the mother had the care of her two small children in addition to her household duties. The child was seated on the doorstep eating bread and milk which she had provided him. The house was at least twenty-five feet from the street with a narrow passway between other houses as an access to the street. She went indoors to get him something more to eat, and returned in a few minutes, and he was not there. She started to hunt him and immediately met persons carrying him home, already injured.

Under these circumstances, as was said in *Frick v. St. Louis etc. R'y Co.*, 75 Mo. 547, it cannot be held as a matter of law that the mother actively permitted or consented to the child going upon the railroad track, or that she failed to exercise such care for the safety of the child as ordinarily prudent persons in her situation deem proper and sufficient in like circumstances. She was not chargeable as a matter of law with contributory negligence, and the instruction which was given at the request of the defendant fairly presented the issue to the jury.

3. On the measure of damages the court instructed the jury that if they found for plaintiff they should "assess his damages at such a sum as they may believe from the evidence will be a fair compensation to him: 1. For any pain of body or mind; 2. For any loss of earnings after he shall have attained the age of twenty-one years; 3. For any physical disfigurement or deformity; 4. For any permanent injury to his body other than disfigurement and deformity which the plaintiff has sustained, or will hereafter sustain, by reason of said injuries and directly caused thereby," not to exceed ten thousand dollars. This instruction is objected to on the ground that it is "inconsistent and ambiguous in its language, misleading and confusing." It is true the instruction is not as clear or perspicuous as it might have been, but it does not seem so wanting in these attributes as could have confused or misled the jury. The instruction confines the jury to the four elements of damage specified therein, and they are separately and clearly stated, and we think the general conclusion, though somewhat ambiguous, could not have been misapplied or misunderstood.

The chief objection to this instruction is made to the dam-

age authorized "for loss of earnings after he shall have attained the age of twenty-one years." It is urged that there was no evidence from which the jury could have inferred what physical capacity for labor plaintiff would have possessed if he had not been injured, or what capacity he will have with his disability, if any, resulting from the injury. The injuries to plaintiff were very serious, one arm was broken and the elbow dislocated, leaving the arm somewhat crooked; the scalp was torn from one side of the head; the skull was fractured, and a piece as large as a half dollar removed; and the facial nerve was divided, causing paralysis of the face, which drew the mouth around to one side, greatly disfiguring him. The doctor who treated plaintiff was not certain that the injuries to the head would not cause apoplexy or epilepsy, or that the arm would be permanently restored.

It is well settled that prospective damage to adults, on account of impairment of earning capacity in the future, is a proper element of damages in cases of personal injuries: *Whalen v. St. Louis etc. R'y Co.*, 60 Mo. 323; *Pry v. Hannibal etc. R. R. Co.*, 73 Mo. 124; 2 Sedgwick on Damages, 8th ed., sec. 485. Ordinarily damages will not be awarded to compensate for losses not yet experienced on mere conjectural possibility that such loss will occur. In the case of an adult, proof should be made of "previous physical condition and ability to labor, or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary damage": 5 Am. & Eng. Ency. of Law, 41, and authorities cited.

What may or may not be done by anyone in the future depends upon so many contingencies that prospective loss of earnings cannot be susceptible of direct and conclusive proof even in cases of adults. Nevertheless, as has been seen, such damages are uniformly allowed. The impairment of the earning capacity of one in his infancy is as great a damage to him as though he had not been injured until the day he reached his majority. That he would have an equal right to compensation logically follows. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future no one can tell with any certainty. It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience, and "enlightened conscience of the jurors, guided by the facts and

circumstances in the case": *Grogan v. Broadway Foundry Co.*, 87 Mo. 326; *Nagel v. Missouri Pac. R'y Co.*, 75 Mo. 658; 42 Am. Rep. 418; *Davis v. Central R. R. Co.*, 60 Ga. 329; *Fisher v. Jansen*, 128 Ill. 551; *City of Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Houston etc. R. R. Co. v. Miller*, 51 Tex. 275.

Considering the nature of the injuries received by plaintiff, and the amount of the verdict, it is evident the jury were moderate and fair to both parties in assessing the damages, and that but little, if anything, was allowed by way of prospective loss of earnings.

Judgment affirmed. All concur.

STREET-RAILWAYS — RUNNING OVER CHILD IN STREET. — The servants of a street-railway operating its cars at a rapid rate of speed along the streets of a city are bound to be on the lookout and take all reasonable measures to avoid injury to men, women, or children who may be upon the streets: *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591, and note; note to *Cooper v. Lake Shore etc. R'y Co.*, 11 Am. St. Rep. 491. Drivers of street-cars must keep a diligent watch for persons on foot, especially for children, either on the track or moving towards it, and at the first appearance of danger the car must be stopped in the shortest time and space possible: *Fath v. Tower Grove etc. R'y*, 105 Mo. 537; *Shenners v. West Side etc. R'y Co.*, 78 Wis. 382.

NEGLECT — PARENTS OF INFANT NOT CHARGEABLE WITH, WHEN. — Where a child received injury from playing with an unlocked turn-table, and the mother is charged with negligence in not watching over him properly, the court may charge the jury that they may consider the evidence as to her circumstances in determining the question as to her negligence: *Burrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186. The question whether the mother of an infant child exercised due care to prevent him from leaving the house and going upon the highway is properly left to the jury: *Marsland v. Murray*, 148 Mass. 91; 12 Am. St. Rep. 520; note to *Chicago etc. R. R. Co. v. Melisack*, 19 Am. St. Rep. 20. See also *San Antonio etc. R'y Co. v. Cailloutte*, 79 Tex. 341, where an infant crawled out of the house upon a railway track and was killed, and in which the mother was held not guilty of contributory negligence.

DAMAGES FOR INJURY TO CHILD. — Among the results of a negligent injury to a minor child to be considered in estimating his damages are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary callings of life at and after majority: *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320, and note. The damages which diminish the minor's capacity to earn a living must be limited to the period after his majority: *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615, and note.

O'BRYAN v. ALLEN.

[108 MISSOURI, 227.]

EVIDENCE, LAW CHANGING RULES OF, VALID, THOUGH IT MAKE WITNESS INCOMPETENT. — Laws which change the rules of evidence relate to the remedy only, and may be applied to existing causes of action, and to actions pending at the time of their enactment, even though their effect is to render a person incompetent as a witness who was before competent.

PAROL GIFT OF LAND FROM FATHER TO SON, EVIDENCE OF. — The mere fact that a son removes from another state to real estate owned by his father, lives thereon with his family, and expends a small sum of money, part of a larger amount received from his father, in keeping the property in repair, is insufficient evidence to establish a parol gift of the property from his father to him.

THE opinion states the case.

Douglas and Scudder and J. R. Walker, for the appellants.

John Cosgrove and J. H. Johnston, for the respondents.

BRACE, J. The plaintiffs are the widow of Noah D. Bell, deceased, and her present husband. Noah D. Bell, deceased, was a son of Henry Bell, deceased. The defendants, Maria G. Allen, Clara D. Thompson, and Henry Bell, are the children of the plaintiff Harriet and her former husband, Noah D. Bell. Defendant, D. D. Bell, is a son of Henry Bell, deceased. Ernest Bell and Clara Bell Tracy are the children of Dan Bell, deceased, who was a son of Henry Bell, deceased.

The action is in the nature of a bill in equity to declare that the said Noah D. Bell died seised in equity of an inheritable estate in a tract of land in Cooper County, containing about 223 acres, in which the said Harriet is entitled to dower, and for its assignment, upon the ground that the said Henry Bell in his lifetime made a parol gift of said land to his said son, Noah D., but died seised in fee-simple of the legal estate therein, without conveying the same to the said Noah D. The defendants, D. D. Bell, Ernest Bell, and Clara Bell Tracy, answered, denying all the material allegations of the petition, and setting up the statute of frauds. The other defendants made no answer. The issues of fact were submitted to a jury, who found for the plaintiffs, and the court decreed in accordance with the prayer of the petition. Commissioners were appointed and dower assigned plaintiff in the land also as prayed for, and the defendants who joined issue appeal.

1. On the trial before the jury the plaintiff, Mrs. O'Bryan, and her two children, the defendants, Mrs. Allen and Mrs.

Thompson, as also Mr. Thompson, her husband, were introduced, and over the objections of the defendant (to their competency as witnesses), were permitted to testify, and this is complained of as error.

When this case was here before (*O'Bryan v. Allen*, 95 Mo. 68) the same point was made and passed upon as to the competency of Mrs. O'Bryan. We then held that she was a competent witness under section 4010 of the Revised Statutes of 1879, on the ground that "she was not one of the original parties to the contract or cause of action on trial." Since that decision was made, and before the trial of this case in the court below, from which this appeal was taken, said section was amended so that the first proviso thereof then and now reads: "That in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to *such contract or cause of action* shall not be admitted to testify *either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or, if living, would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided.*" Sess. Acts, 1887, p. 287; Rev. Stats. 1889, sec. 8918.

The amendment consisted in inserting in the original section the words in italics. There can be no question under this amendment that the witnesses objected to were disqualified to testify upon the issues on this trial at the time they were called, and the court committed error in permitting them to testify. It is urged, in support of the ruling of the court, that at the time this amendment was passed, this cause was pending; that there had then been one trial in the case, in which the plaintiff had the benefit of the evidence of some of these witnesses, they being, under the law as it then stood, competent witnesses; and that the plaintiff, therefore, had some vested right in their evidence, which is entitled to the protection of the constitutional provision prohibiting the passage of a law "impairing the obligation of the contracts or retrospective in its operation."

It is not seen how this contention can be maintained. Laws which change the rules of evidence relate to the remedy only, may be applied to existing causes of action, and are not precluded from such application by the constitutional provision:

Cooley on Constitutional Limitations, 3d ed., p. 288. The learned author in another connection thus states the doctrine upon this subject: "A right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must, therefore, at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action even in those states in which retrospective laws are forbidden; for the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future, and it could not, therefore, be called retrospective even though some of the controversies upon which it may act were in progress before": Cooley on Constitutional Limitations, p. 367; *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218.

The trend of modern legislation has been until recently in the direction of enlarging the class of competent witnesses, and the rulings in most of the cases have been upon legislation making those competent who before were incompetent to testify, but the principle is the same in the one as in the other case. By such changes in the law, as in all general legislation, hardship is sometimes worked in individual cases; but in this particular case, there need be no such complaint, for all the substantial facts necessary to an enlightened judgment by the chancellor appear in the evidence of other witnesses. Briefly stated, they are as follows:—

2. Henry Bell was a prosperous and wealthy merchant, residing in Lexington, Kentucky; he had three sons, Noah, Daniel, and D. D., for all of whom he seems to have entertained a warm parental affection. Noah, who was living with his father at the time (in 1857), married an estimable Tennessee lady, the plaintiff in this case, and soon thereafter his father set him up in business in Keokuk, Iowa. He conducted the business for a short time and failed, his father paying his debts. He returned to Lexington, remained there a short time, and went thence to St. Louis where he remained until the war broke out, when he went south with his family, and continued there living in Mississippi and Arkansas, until the year 1868. The character of Noah Bell is portrayed in the

evidence in features about which there can be no mistake; he was a good-hearted fellow, whom his father, his family, and his friends loved truly, but improvident, and of "irregular habits." As a consequence, his father felt called upon and did continually contribute to the support of himself and family, as their necessities required, from the time of his marriage to the day of his death.

In 1868, seeing that he was not getting on the world, or likely to, his father determined to charge himself more definitely and directly with the future support and welfare of his son and his family than he had hitherto done, and, in pursuance thereof, bought the premises in question, furnished it with everything necessary to make a pleasant home for a country gentleman, and thereafter made him an allowance of three thousand dollars per annum to live on it, as such. This allowance he continued to him until Noah's death in 1877, and to Noah's family until his own death in 1883, besides making them presents of other large sums of money as to him seemed agreeable or necessary, and buying a lot and erecting a house on it in the city of Boonville for a residence for his widow at a cost of eight thousand or nine thousand dollars, not completed until after his death.

During the nine years that Noah resided on the premises, some necessary repairs and improvements were made on the place out of money furnished by his father amounting to an insignificant sum when compared either with the rental value of the property or his allowance. During the whole period he and his family lived in perfect accord and harmony with his father, governing themselves in accordance with his wishes in every respect in regard to the premises, and there is not in the evidence a suggestion that the thought ever entered Noah's mind, that he was holding possession of this property adversely to his father's title, while in every line is disclosed the father's intention that that title should remain in himself, and that no alienable or inheritable estate should ever vest in his son. He proposed to take care of this beloved, but somewhat wayward, son and his family, in his own way, as he had a right and knew precisely how to do, and he did take care of them while he lived, and made ample provision for them after his death. It is not within the power or province of a court of equity, out of his bounty to his son given *ex gratia*, to construct an obligation *ex debito justitia* against the father in the son's favor, and then enforce it, as we are asked to do in this

case, with no better foundation to sustain it than the acceptance of that bounty by the son, in moving on the premises from a neighboring state, living on it, and spending a trifle of that same bounty in making and keeping the property in repair and comfortable for the enjoyment of himself and his family.

Henry Bell made a fairly equitable division of his estate. By his will he gave to the widow and children of his deceased son, Noah, ninety thousand dollars in seven-per-cent bonds; twenty-five thousand dollars to each of the children, and fifteen thousand dollars to the widow, to whom he also gave the city lot in Boonville; the devise to the widow was as long as she lived, and remained the widow of his son; and upon her death or marriage the bonds given her went in equal portions to the three children, and the lot to her son Henry. She married again; *hinc illæ lachrymæ*.

The bill should have been dismissed at the hearing on the evidence. The judgment is reversed. In the first paragraph, SHERWOOD, C. J., and BLACK, J., concur. In the second and in the result all concur.

PAROL GIFT OF LAND FROM PARENT TO CHILD — EVIDENCE TO ESTABLISH. The fact that a son is in possession of land and has made improvements thereon, is not evidence of a gift of the land when the legal title is in the father: *Cox v. Cox*, 26 Pa. St. 375; 67 Am. Dec. 432. No sale or gift can be inferred from a parent giving a child the use of a farm or house, and promising a gift of the same at the parent's death: *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425; *Lich v. Lich*, 81 Iowa, 84. A parol gift from a parent to a child can be established only by clear and convincing evidence: *Collins v. Lofftus*, 10 Leigh, 5; 34 Am. Dec. 719. See also *Hardman v. Nowell*, 84 Ga. 46.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW. — The power of the legislature to alter the rules of evidence as they existed at common law, and to vary or limit existing rules, is not affected by the constitutional provision prohibiting the taking of life or property without due process of law: *People v. Turner*, 117 N. Y. 227; 15 Am. St. Rep. 498, and note.

ANCHOR MILLING COMPANY v. WALSH.

[108 MISSOURI, 277.]

EVIDENCE, ACCOUNT-BOOKS ADMISSIBLE IN FAVOR OF PARTY BY WHOM KEPT. — An account-book of original entries, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the party by whom it is kept.

SECONDARY EVIDENCE OF CONTENTS OF LOST BOOK OF ACCOUNT ADMISSIBLE, WHEN. — Secondary evidence of the contents of an account-book of original entries is admissible upon proper proof of the loss of such book.

ACTION to recover overpayments.

G. M. Stewart, for the appellant.

A. R. Taylor and A. A. Paxson, for the respondent.

BLACK, J. This was an action to recover overpayments alleged to have been made by the plaintiff to the defendant. A trial was had before a jury, which resulted in a verdict and judgment for defendant. The St. Louis court of appeals, to which the cause was appealed, reversed the judgment and remanded the cause for error in the instructions. That court, however, sustained the ruling of the trial court in excluding a shipping-book offered in evidence by the plaintiff. On this question one of the judges deemed the opinion contrary to *Smith v. Beattie*, 57 Mo. 281, and for this reason the cause was then certified to this court.

Defendant had a contract with plaintiff whereby he was to receive a specified price for hauling wheat and flour to the mill and a specified price per barrel and sack for hauling flour and other mill products from the mill to different points in St. Louis and East St. Louis. Books were kept at the plaintiff's warehouse, which was about a block distant from the mill, showing the wheat and flour received and shipments made, and these books disclosed the amount of hauling done by the defendant. A Mr. Timmons, who was one of the plaintiff's clerks at the warehouse, made up a statement on a slip of paper at the end of each week, showing the amount due the defendant. The plaintiff's cashier at the mill paid the defendant the amount due as disclosed by these statements. The business proceeded in this way from the first to the latter part of 1883, when the plaintiff caused the books to be examined and concluded that payments had been made to defendant largely in excess of what he had earned. Timmons and defendant left the employ of the plaintiff, and a criminal prosecution and this suit followed.

The shipping-book, offered in evidence by the plaintiff and excluded by the court, was made up and kept in the following manner: Orders were sent from the office at the mill to the warehouse to send designated amounts of flour, etc., to designated places. The orders were then entered in the shipping-book by Timmons, the shipping clerk, or by Mr. Warren, who had a general supervision over all the business at the warehouse. The orders were then copied into a small hand-book for the use of the foreman, who delivered the articles to defendant's teamsters, made a note of the fact and returned the book to the clerk, who made entries on the shipping-book, showing, among other things, the delivery of the articles to defendant. Mr. Warren says he always compared the orders with the book when made up, and then returned the orders to the mill office; that he knew the flour and other mill products were delivered to defendant from the information received from the small book, and in some cases from personal observation. These returned orders were lost or destroyed. Timmons, the shipping clerk, was not called as a witness. With this preliminary proof the plaintiff offered in evidence the shipping-book, but the court excluded it.

In *Hissrick v. McPherson*, 20 Mo. 310, plaintiff brought an action on an account for meat sold from day to day. He offered in evidence his daily account-book, supplemented by an affidavit that the account was just and correct. This court held that the book, the entries having been made by the plaintiff himself, were not competent evidence, though supported by his supplementary oath. That case was, doubtless, ruled according to strict rules of common law. It constitutes the basis of the ruling of the court of appeals in the case in hand and in some other cases.

When the case of *Hissrick v. McPherson*, 20 Mo. 310, was decided, parties to a suit could not testify in their own behalf. It remains to be seen what is the effect of subsequent legislation and subsequent rulings of this court. Section 1 of chapter 144 of the General Statutes of 1865, for the first time made parties to a suit competent witnesses in their own behalf. An exception is made where one of the parties to the contract or cause of action is dead or insane, and concludes: "Provided further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book-account, the party living may be a witness in his own favor, so far as to prove in

whose handwriting his charges are, and when made and no further."

The next section is a new enactment, and after stating that the court may, where the matter at issue and on trial is a proper and usual subject of charges on books of account required either party to produce his account-books, declares: "And no disputed account shall be allowed upon the oath of the party, when it shall appear that he has a book of original entries, unless such book shall be produced upon reasonable request."

The first section is almost an exact copy of section 24 of chapter 36 of the General Statutes of Vermont of 1862; and the second section is evidently modeled after a section in the statutes of that state concerning the action of account. In that state books of original entry are evidence in actions of account in favor of, as well as against, the party by whom kept: *Johnson v. Dexter*, 37 Vt. 641; *Hunter v. Kittredge's Estate*, 41 Vt. 359. That court, in construing these sections, takes them in connection with other connected sections of the statutes of that state, while we are to construe them in connection with other sections of our statute laws. The decisions of that court will be of some aid, but not decisive. Where, as there, one or two sections are taken from the body of a statute of another state and incorporated into our statute law on a given subject, we must construe all the sections of our law upon the particular subject together. Now, these sections as they appear in our statutes, do not, in terms, say that a party to a suit on account may introduce in evidence his account-books; but all this is fairly implied. Why should the living party be allowed to be a witness in his own favor to prove in whose handwriting his charges are and by whom made, as is allowed by the last proviso to the first section, unless to lay a foundation for the introduction of the books?

If a living party to a cause of action may introduce his books in evidence in his own favor, as plainly implied by the proviso, then what possible reason can be assigned why he should not do the same thing where both parties to the cause of action on trial are living? And the last clause of the second section leaves a very strong inference that the legislature deemed books of original entry primary evidence. We think these sections were designed to and do give complete recognition to the rule which then prevailed and now prevails in most of the states and is sometimes called the American rule;

namely, that contemporaneous book entries are evidence for as well as against the party by whom they are kept. Says Wharton: "In the United States, a tradesman's book of original entries is, in most jurisdictions, received in evidence as *prima facie* proof, when supported by the tradesman's oath": 1 Wharton on Evidence, 3d ed., sec. 678. On this subject another author, often cited and generally followed by this court, says: "In the United States this principle has been carried farther, and extends to entries made by the party himself in his own shop books. Though this evidence has sometimes been said to be admitted contrary to the rules of the common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it is evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury": 1 Greenleaf on Evidence, 14th ed., sec. 118. See also Wood on Practice Evidence, sec. 139. Many cases are cited by these authors, and they need not be repeated here.

At this place it may be well to notice the rulings of this court made since 1865. *Smith v. Beattie*, 57 Mo. 281, decided in 1874, was a suit in equity to enjoin a sale under a deed of trust. The defendants were bankers. The plaintiff claimed that the notes secured by the deed of trust were given as security for what might be due defendants on a final adjustment of accounts, and that defendants were indebted to him for moneys received and not accounted for. It appears the defendants brought their books into court pursuant to an order made on motion of the plaintiff, but the plaintiff did not use them. The defendants then proved by their bookkeeper and clerk that the books were accurately kept in the regular course of business, that the entries were made and books written up each day from tickets of the teller and checks of the customer, and that the checks of the plaintiff could not be produced because delivered up to him. With this foundation the books were given in evidence, and this court sustained the ruling of the trial court.

The case of *Anderson v. Volmer*, 83 Mo. 404, has little or nothing to do with the question in hand; for the question as to whether books of account should be received in evidence was not considered.

In *Nelson v. Nelson*, 90 Mo. 460, it was conceded on both

sides that account-books of a deceased person, when properly kept, are evidence in favor of the estate. In that case we held that certain items of the account should have been excluded, because it appeared upon the face of the book produced that the items were not made contemporaneous with the transaction recorded; but that case concedes the rule to be that book-accounts are admissible in favor of the party who keep them when the entries are made at the time of the transaction, and section 118 of Greenleaf on Evidence is cited with approval.

In *Mathias v. O'Neill*, 94 Mo. 520, a bookkeeper at a bank was able to say he made certain entries, that the books were kept correctly, and that he believed them to be correct, but he could not recall the particular transaction. On this showing he was allowed to state his belief as to the fact recorded, and the ruling was sustained. Such evidence is sufficient to lay a foundation for the admission of the books themselves: *Bank of Monroe v. Culver*, 2 Hill, 531.

The cases of *Smith v. Beattie*, 57 Mo. 281; *Nelson v. Nelson*, 90 Mo. 460; and *Mathias v. O'Neill*, 94 Mo. 520; show a decided tendency to a far more liberal rule than that which prevailed prior to 1865. They are in perfect accord with what is called the American rule. Indeed, one of them gives complete adherence to that rule, a rule which we have said was adopted by the General Statutes of 1865.

Since a party may testify in his own favor, it must be conceded that he, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify as to the facts with his memory thus refreshed. Now, in cases of an account composed of many items, all this means nothing more than reading the book in evidence. This we all know from daily experience in the trial courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt. Account-books are admitted in evidence for the person by whom they are kept when the entries are made at the time, or nearly so, of doing the principal fact, because entries made under such circumstances constitute a part of the *res gestæ*. An entry thus made is more than a mere declaration of the party. It is a verbal act following the principal fact in the orderly conduct of business. Such is certainly the custom and course of business at the present day. We, therefore, conclude that an account-book of original entries, fair on its face, and shown to have been kept

in its usual course of business, is evidence, even in favor of the party by whom they are kept. It follows that the shipping-book should have been received in evidence.

The abstract says another shipping-book covering part of the time in question was placed in the hands of Timmons for the purpose of verifying a certain statement that "the book and statement so given to Timmons were never seen afterwards by appellant, and the company was unable to further account for their loss." This is only the appellant's conclusion as to what his evidence disclosed concerning the loss of the book, and not an abstract of the evidence on that subject. We can only say that upon due proof of the loss of the book, evidence of its contents should be received: *Ætna Ins. Co. v. Weide*, 9 Wall. 677; *Holmes v. Marden*, 12 Pick. 169.

As the court of appeals reversed the judgment and remanded the cause for other errors, the judgment of that court is affirmed.

BARCLAY, J., absent; the other judges concur.

EVIDENCE. — BOOKS OF ACCOUNT AS: See note to *Merrill v. Ithaca etc. R. R. Co.*, 30 Am. Dec. 142; extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191-198; note to *Township of Otsego Lake v. Kirsten*, 16 Am. St. Rep. 528. The rule that private books of account are admissible in evidence in favor of the person keeping them is supported by the following recent cases: *Woolsey v. Bohn*, 41 Minn. 235; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Gilbert v. Merriam etc. Saddlery Co.*, 26 Neb. 194; *Setchel v. Keigwin*, 57 Conn. 473; *Montague v. Dougan*, 68 Mich. 98; *Hopkins v. Stefan*, 77 Wis. 45. Where there is no direct evidence of the contract between partners the partnership-books may be considered in determining their rights. *Johnston v. Ballard*, 83 Tex. 486; *Gregg v. Hord*, 129 Ill. 613.

EVIDENCE — SECONDARY OF BOOKS OF ACCOUNT. — Secondary evidence of the contents of books of account is admissible only when the absence of the books is accounted for: *Hunt v. Roylance*, 11 Cush. 117; 59 Am. Dec. 140.

BATTNER v. BAKER.

[108 MISSOURI, 311.]

BOUNDARIES—ADJOINING OWNERS NOT BOUND BY MISTAKEN LINE, WHEN.—

Where lands are divided by a fence which their owners suppose to be the true line, each claiming only to the true line wherever that may be, they are not bound by the supposed line and must conform to the true line when it is ascertained.

POSSESSION OF LAND UP TO BOUNDARY LINE, ADVERSE, WHEN.—

When a person takes and holds possession of land up to a fence, under claim of ownership, his possession will be adverse, although he may believe the fence to be on the true line, when in fact it is not on the true line.

EJECTMENT.

Culver and Davis and Benj. Phillips, for the appellant.

Vories and Vories, for the respondent.

BLACK, J. This was an action of ejectment commenced in 1888 to recover a strip of land off of the south side of lot 4 in block 2 of Stewart's addition to the city of St. Joseph. The lots in that block have a length of one hundred and twenty-five feet, running east and west, and a width of twenty-five feet each. They are numbered from north to south. The plaintiff owns lots 1, 2, 3, and 4, and defendant owns lots 5, 6, 7, and 8.

At the trial the parties agreed upon the following facts: That defendant, more than twenty years before the commencement of this suit, took possession of lots 4, 5, 6, and 7, and fenced the same, and has been in the possession thereof since that date; that he built the fence between lots 4 and 5 according to stakes which had been sent pursuant to a survey, and the fence was supposed to be on the true line; that his inclosure included one hundred feet front; that defendant during that time used as his own all of the ground in his inclosure. It was further agreed that plaintiff took possession of lots 1, 2, 3, and 4 in 1881, as the fences were standing at that time; that his inclosure included one hundred feet front and projected into a street on the north side a distance equal to the amount of land sued for; that a true survey was made in 1887, from which it is shown that defendant's inclosure included a strip of ground on the south side of lot 4, which strip is six and one half feet wide at the west end and ten and a half feet wide at the east end. The defendant, more than ten years before the commencement of this suit, erected a second dwelling-house on lots 5, 6, 7, and 8, being a one-story frame

house with brick foundation, which building projects one foot, more or less, over the true line.

In addition to these agreed facts, the defendant testified: "I have always claimed the land up to the fence. I claimed it because I thought it was mine, and still think so. I intended to claim to the true line, but thought the fence was the true line, and only claimed to the fence because I thought it was the true line. There was never any dispute about the true line until the last survey was made. When that survey was made, and they began building a fence over the old line, I tore it down because they were building it on my land."

On this evidence the court declared the law to be that plaintiff should recover, to which ruling the defendant excepted.

The question on these agreed facts and the evidence is, whether the defendant has acquired the land sued for, under the statute of limitations. That defendant has been in actual possession of the strip of land for more than the statutory period of time, is conceded. The question, therefore, is whether his possession has been adverse to the true owners. Where adjoining land-owners are divided by a fence, which they suppose is the true line, each claiming only to the true line, wherever that may be, they are not bound by the supposed line, and must conform to the true line when it is ascertained: *Jacobs v. Moseley*, 91 Mo. 457; *Schad v. Sharp*, 95 Mo. 574; *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Skinker v. Haagsma*, 99 Mo. 209. "Their possession under mistake or ignorance of the true line dividing their premises, and without intending to claim beyond the true line when discovered, will not work a disseisin in favor of either party: *Schad v. Sharp*, 95 Mo. 574; but where one takes and holds possession up to a fence, and claims to be the owner up to it, his possession will be adverse, and this, too, though he may believe the fence to be on the true line, when, in point of fact, it is not on the true line: *Cole v. Parker*, 70 Mo. 379; *Handlan v. McManus*, 100 Mo. 125; 18 Am. St. Rep. 533. The distinction between these rules lies in the fact whether the party claimed only to the true line wherever that might be, or to the fence.

The circuit court committed manifest error in the application of these well-settled rules of law. It is true the defendant says he thought the fence was on the true line, and that he claimed to it because he thought it was the true line; but that he claimed to the fence is clearly asserted by him. Be-

sides this, it is agreed that he has been in actual possession, and has used as his own all of the ground within his inclosure. Emphasis is given to all of this by the fact that he had but one hundred feet front feet inclosed, the exact width of his four lots, and by the further fact that his building projects one foot over the true line. Though he supposed the fence was on the true line, and for that reason claimed up to it, still he at all times claimed to own the land up to that line, and his possession was adverse because of this claim of ownership. The fact that he was mistaken as to the true line is immaterial when it appears that he claimed up to the fence. The case is entirely different from that where a party in possession simply claims to the true line, wherever that shall be ascertained to be.

It is not necessary to speak of cases where land-owners agree upon a line between their properties, for this case does not belong to that class. The court erred in directing a verdict for the plaintiff, and the judgment is reversed and the cause remanded.

BARCLAY, J., absent; the other judges concur.

ADVERSE POSSESSION — MISTAKE AS TO BOUNDARY LINE BETWEEN ADJOINING OWNERS. — Where owners of adjacent lands claim only to the true line between them, without intending to claim beyond it, the possession of one beyond the true line is not adverse to the other: *Kunze v. Evans*, 107 Mo. 487; 28 Am. St. Rep. 435, and note; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383, and extended note; but if a purchaser incloses land contiguous to his own by mistake, believing that he is putting his fence on the true line, and holds such land for seven years, such possession is adverse, and will avail against the true owner: *Erck v. Church*, 87 Tenn. 575. If two adjacent owners agree upon the location of a line for a division fence between them, and each holds possession for the statutory period up to that line, the title to each becomes perfect without reference to the true boundary line between them: *Hoffman v. White*, 90 Ala. 354; *Atwood v. Canrike*, 86 Mich. 99. Where one takes and holds up to a wall or fence and claims to be the owner up to that wall or fence, his possession will be adverse though there is a mistake as to the line: *Havillan v. McManus*, 100 Mo. 124; 18 Am. St. Rep. 533; *Caulfield v. Clark*, 17 Or. 473; 11 Am. St. Rep. 845, and note; *Tee v. Pflug*, 24 Neb. 666; 8 Am. St. Rep. 231, and note.

EOFF v. IRVINE.

[108 MISSOURI, 378.]

ATTORNEY PURCHASING OUTSTANDING TITLE TO CLIENT'S LAND HOLDS AS TRUSTEE. — An attorney who has been consulted about a title to land will not be permitted to purchase an outstanding one, and then set it up in opposition to his client; and if he does purchase such outstanding title he holds it in trust for his client, if the latter sees fit to claim the benefit of the purchase; nor does it make any difference that the attorney has withdrawn from his client's employment before he makes the purchase.

INFORMATION ACQUIRED DURING EMPLOYMENT CANNOT BE USED BY ATTORNEY. — The relation of attorney and client is based and founded upon trust and confidence, and information acquired concerning the subject-matter of the employment whilst the relation exists cannot be thereafter used by the attorney against the client.

QUITCLAIM DEED, RIGHTS OF PURCHASER BY. — A purchaser by quitclaim deed for value and without notice acquires title as against a prior unrecorded deed or other instrument conveying or affecting real estate; but one who takes by quitclaim deed a title which is subject to equities in the hands of the grantor takes subject to such equities. He is, however, entitled to be reimbursed to the extent of the purchase-money he has paid, with interest.

Hayward and Griffin, for the appellant.

H. E. Colvin, for the respondents.

BLACK, J. The object of this suit in equity is to have the defendants declared the holders of the title to a lot in Kansas City in trust for the plaintiff, with a further prayer for general relief. The court found for the defendants, and the plaintiff Eoff appealed. The defendants, Leigh H. Irvine and Louis C. Irvine, are brothers, and the sons of the other defendants, Clark Irvine and Annie K. Irvine. All of the above-named parties resided at Kansas City at the time of the various transactions hereafter mentioned.

The pleadings and the undisputed evidence show that the plaintiff purchased the lot in 1886, his grantor having only a tax title. Some doubt arose as to the validity of his title, and his abstract of the title was placed in the hands of Leigh H. Irvine and Mr. Blair for examination. They were attorneys at law and partners, doing business under the firm name of Blair and Irvine. They received the abstract about the 1st of May, 1887. On June 1, 1887, Hefferman, who was a former half-owner of the lot, conveyed his undivided one half to one Kribben, who resided in the city of St. Louis. Kribben conveyed the same interest to Louis C. Irvine by a quitclaim deed, dated the 14th of September, 1887, for one

hundred dollars, paid by either Leigh H. Irvine or by Blair and Irvine. On the 8th of October, 1887, Leigh H. Irvine procured a quitclaim deed from Askew for the other undivided one half for the consideration of one hundred dollars, and on the 18th of the same month conveyed his interest by quitclaim deed to his brother, Louis C. Irvine, and in August of that year the latter conveyed the lot to his mother by a warranty deed.

The first disputed issue of fact is, whether the relation of attorney and client existed between Leigh H. Irvine and the plaintiff. It appears the plaintiff and a Mr. Stevens were neighbors, and in former years Stevens had been a practicing attorney; plaintiff gave Stevens the abstract of title, and requested him to examine it, but Stevens being out of the practice, advised plaintiff to employ Blair and Irvine. The plaintiff did not know these attorneys, and he requested Stevens to take it to them for examination. The evidence of Stevens is, that he left the abstract at the office of the attorneys on a table, but he does not know whether either of them was present. This was probably about the 1st of May, 1887. In a short time plaintiff received a note from Irvine asking whether he would pay one thousand dollars for a quitclaim deed, with the request to call. He says he called at the office of these attorneys, and Irvine then pointed out the defects in the title, and advised him to procure a deed from the owners. Irvine said he thought he could get the deed. There was a like conversation on the streets. He says the price asked for a quitclaim deed was more than he had paid for the property; that after thinking over the matter he concluded Irvine was not acting in his interest, and that he directed Stevens to get the abstract, and that Stevens got it and delivered it to him. This was ten days or two weeks after the abstract had been left at the office of the attorneys. They did not inform the plaintiff from whom they expected to get the proposed deed. The plaintiff paid the attorneys nothing for their services, and they made no demand of him for compensation.

The evidence of Mr. Stevens, in its general tenor, leaves it in doubt as to whether he employed Blair and Irvine to examine the abstract; but he produces this doubt by the erroneous assumption on his part that it required a payment of money by plaintiff to the attorneys to create the relation of attorney and client. He was on friendly terms with Blair and Irvine, and his remembrance is defective as to what he

did in the execution of his agency. The proof is clear that plaintiff directed Stevens to employ these attorneys, that Stevens left the abstract at their office, and that Irvine thereafter sent the plaintiff the note before mentioned, and advised the plaintiff to get a quitclaim deed from the owner. Irvine proposed to get it for him. This evidence as a whole shows beyond doubt that Stevens did employ these attorneys, and that they examined the abstract pursuant to that employment. The relation of attorney and client did therefore exist between Blair and Leigh H. Irvine on the one hand and the plaintiff on the other.

An attorney who has been consulted about a title to land will not be permitted to purchase an outstanding one, and then set it up in opposition to his client. If he does purchase such an outstanding title, he holds it in trust for his client, if the client sees fit to claim the benefit of the purchase: *Davis v. Kline*, 96 Mo. 406. Says the supreme court of the United States, it may be laid down as a general proposition that an attorney can in no case, without his client's consent, buy and hold otherwise than in trust an adverse title or interest touching the thing to which his employment relates: *Baker v. Humphrey*, 101 U. S. 494.

Nor does it make any difference that the attorneys or either of them obtained the outstanding title after plaintiff withdrew the abstract from their hands. It may be conceded that such withdrawal put an end to their employment, but that did not leave them free to buy in the title about which they had given their client advice, and then use it against him. Says Weeks: "An attorney cannot use information received by him from his client in opposition to the client. An attorney, for instance, who has been consulted respecting the title to lands, cannot afterwards become a purchaser of such lands from the state or from a third party, to use against his client. Such a purchase will inure to the benefit of the client": Weeks on Attorneys, sec. 277. The relation of attorney and client is based and founded upon trust and confidence, and information acquired concerning the subject-matter of the employment whilst the relation exists, cannot be thereafter used by the attorney against the client. No system of jurisprudence with which we are acquainted permits such an abuse of the confidence and trust reposed in an attorney. It follows that plaintiff is entitled to the relief which he asks as against Leigh H. Irvine.

The next question is whether Louis C. Irvine took the title subject to the equitable rights of the plaintiff. Hefferman, it is to be remembered, conveyed the undivided half of the outstanding title to Kribben. This deed was made at the instance of Leigh H. Irvine, and Kribben conveyed the same interest to Louis C. Irvine. Leigh H. Irvine procured a deed from Askew for the other half, and then conveyed the interest thus acquired to his brother Louis. All of the foregoing deeds were quitclaim in form. Louis then conveyed the lot to his mother, but this deed, it is conceded by Louis, was without consideration.

The attorneys, Leigh H. Irvine and Blair, were not called as witnesses. Louis C. Irvine testified on two occasions, one by deposition taken and read in evidence by the plaintiff, and again in his own behalf on the trial. In former years he had been a lawyer, but at the time in question was a real estate dealer and speculator. He on both occasions states that he had no notice or knowledge that his brother and Blair had been employed to examine the plaintiff's abstract of title. In his deposition he says he did not know Kribben, had no dealings with him, and did not know who paid Kribben for the deed from Kribben to himself; that his brother used Kribben's name as a matter of convenience; that he purchased the property from his brother and Blair, and at his brother's request took the deed to the one-half from Kribben; that he did not examine the title but relied upon Blair's opinion as to it; that he knew his brother and Blair were purchasing the lot from Hefferman and Askew; and that there was in reality no consideration for the deed from himself to his mother. In his testimony given on the trial he says his attention was called to this property by his brother and Blair in conversations concerning invalid tax titles under a decision of this court; that they said they were looking up such titles and had a man searching the records and that money could be made out of them; that they talked more about this lot than about any other one; that the conversations lasted over a period of three or four months, and that he finally bought this lot from them for fifteen hundred dollars, and gave them a note for seven hundred dollars with a deed of trust back to secure it, five hundred dollars in cash, and a receipt for three hundred dollars owing him by his brother.

The first deed to Louis bears date the 14th of September, 1887, and if he and his brother had conversations con-

cerning the proposed purchase over a period of four months before it was made, then some of the conversations must have occurred during or near the time the plaintiff's abstract of title was in the hands of Leigh Irvine. It is perfectly clear that Leigh discovered the defects in the plaintiff's title when acting for plaintiff in the capacity of an attorney, and it seems reasonable that Louis must have had some information as to how and under what circumstances those defects were discovered. Louis, of course, knew that the plaintiff held the tax deed, and he took a bond from his brother Leigh to remove the cloud upon the title created by the tax deed. He purchased knowing that he must have a contest with the plaintiff as to the validity of the tax deed, and knowing that a conveyance of the property to his mother could not affect that contest. Why then make the deed to the mother without consideration unless there was some other claim against the property?

But it is not necessary to pursue this inquiry as to actual notice of plaintiff's equitable right to a definite conclusion. Louis claims under quitclaim deeds and nothing else, so the case concedes, though but one of them is found in the record. A purchaser by quitclaim deed, for value and without notice, acquires title, as against a prior unrecorded deed or other instrument conveying or affecting real estate; for such is the effect of our recording act: *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316; *Boogher v. Neece*, 75 Mo. 383; *Willingham v. Hardin*, 75 Mo. 429; *Munson v. Ensor*, 94 Mo. 504; *Ebersole v. Rankin*, 102 Mo. 488; *Hope v. Blair*, 105 Mo. 90; 24 Am. St. Rep. 366; but the recording act does not apply to equities arising out of a breach or abuse of a trust relation. The facts constituting plaintiff's equitable right to hold the property as against Blair and Irvine could not be made matter of record under the recording act. The general rule which is recognized in the foregoing authorities, that one who takes title by quitclaim deed, which title is subject to equities in the hands of the grantor, takes subject to such equities, applies to this case.

As Mrs. Annie K. Irvine paid no consideration for the deed to her she occupies no better position than the other defendants. Indeed, it is not claimed that she does.

The plaintiff in his petition offered to pay into court for defendants the amount paid by Leigh H. Irvine for the outstanding title, conceded to be two hundred dollars; and he renewed that offer in open court on the trial of this cause.

This amount with interest the defendants are entitled to have refunded: *Baker v. Humphrey*, 101 U. S. 494; *Davis v. Smith*, 43 Vt. 269-278.

The judgment in this case is, therefore, reversed and the cause remanded with directions to the circuit court to enter up a decree for the plaintiff divesting the defendants of all title acquired by the said several quitclaim deeds and the deed to Annie K. Irvine, and investing the same in the plaintiff upon the payment by the plaintiff into court for defendant the said two hundred dollars with interest thereon at six per cent per annum from the 8th of October, 1887. All concur.

ATTORNEY AND CLIENT—PURCHASE OF OUTSTANDING TITLE BY ATTORNEY.—An attorney at law is forbidden to purchase an interest in the thing in controversy adverse to his client: *Cunningham v. Jones*, 37 Kan. 477; 1 Am. St. Rep. 257, and note; *Davis v. Kline*, 96 Mo. 401; *Henry v. Raiman*, 25 Pa. St. 354; 64 Am. Dec. 703, and note; and if an attorney purchase an outstanding title for one of two plaintiffs who are his clients, he will be deemed to have purchased in trust for both: *Leisenring v. Black*, 5 Watts, 303; 30 Am. Dec. 322, and note. An attorney will not be allowed to take advantage of his relations with his client to make a contract in relation to the property, to the client's disadvantage: *Miles v. Ervin*, 1 McCord Ch. 524; 16 Am. Dec. 623.

QUITCLAIM DEEDS—RIGHTS OF PURCHASERS: See extended note to *Thorn v. Newsom*, 53 Am. Rep. 749. A purchaser by a quitclaim deed for value acquires title as against every prior unrecorded deed and every instrument in writing which may be recorded whereby the real estate conveyed may be affected in law or equity: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366, and note. The holder of a quitclaim deed takes it charged with prior equities, and is not a *bona fide* purchaser: *Steele v. Sioux Valley Bank*, 79 Iowa, 339; 18 Am. St. Rep. 370, and note; *Peters v. Cartier*, 80 Mich. 124; 20 Am. St. Rep. 508, and note. A quitclaim deed vests in the purchaser only what the grantor could claim; the only exceptions to this rule are those founded upon the recording acts or upon sales made under execution: *Adison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89. See *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243, and note.

BLUEDORN v. MISSOURI PACIFIC RAILWAY COMPANY.

[108 MISSOURI, 439.]

RAILROAD TRAINS, ORDINANCES REGULATING SPEED OF — POLICE REGULATIONS. — Laws and ordinances regulating the speed of railroad trains are police regulations.

DELEGATION TO CITY OF POWER TO REGULATE SPEED OF RAILWAY TRAINS MAY BE IMPLIED. — The delegation to a municipal corporation of the power to regulate the rate of speed of railway trains within its limits need not be given in express terms, but may be implied from the power of the municipality to abate nuisances and to provide for the general welfare.

ORDINANCE OF CITY REGULATING SPEED OF RAILWAY TRAINS NOT CONFINED TO STREETS AND CROSSINGS. — A city ordinance prohibiting the running of railroad trains within the city limits at a greater rate of speed than six miles an hour is not to be construed as applying only to streets and crossings. The power to enact such an ordinance does not depend alone, or to any considerable extent, upon the power of the city to regulate the use of its streets. Such an ordinance applies to the switching yards and main track of the railway company as well as to other places.

EMPLOYEE OF RAILROAD COMPANY MAY RECOVER FOR INJURY RESULTING FROM VIOLATION OF CITY ORDINANCE, WHEN. — An employee of a railroad company who is injured by reason of the company's violation of a city ordinance regulating the speed of railway trains, without having participated in such violation, may recover against the company for the injuries received by him. Nor will his action be defeated by the fact that the persons in charge of the train by which he was injured were fellow-servants, when they were running the train pursuant to a time card prepared and promulgated by the company.

SERVANT MAY RECOVER FOR INJURY CAUSED BY MASTER AND FELLOW-SERVANT. — One servant may recover for an injury caused by the combined negligence of the master and a fellow-servant.

CONTRIBUTORY NEGLIGENCE MUST BE CLEARLY SHOWN, WHEN. — A court will not relieve from liability, on the ground of contributory negligence, a defendant guilty of a flagrant violation of a law or of a municipal regulation, where the evidence does not make out a clear case of such negligence.

CONFLICTING INSTRUCTIONS, REVERSIBLE ERROR TO GIVE. — It is reversible error to give conflicting instructions, no matter at whose instance they are given.

ACTION for personal injuries.

H. S. Priest, for the appellant.

Z. J. Mitchell, for the respondent.

BLACK, J. This is an appeal prosecuted by the defendant from a judgment in favor of plaintiff in a personal damage suit. The plaintiff was injured by a passenger train, while in the employ of the defendant as a night switchman, so that it became necessary to amputate his leg between the knee and

ankle. He founds his action on the violation of an ordinance of the city of St. Louis, which limits the rate of speed of trains to six miles per hour.

The plaintiff had been engaged in railroad work for thirteen years, eleven years of that time in the capacity of a conductor on another road entering the city of St. Louis. He had been in the employ of the defendant as night switchman at the defendant's Seventeenth-street yards in St. Louis for five nights preceding the night on which he received the injuries of which he complains. The accident occurred at night, between ten and eleven o'clock at a point near the Eighteenth-street bridge. The Seventeenth-street yards are just east of the Eighteenth-street bridge. There is what is called a lead track extending from the Seventeenth-street yards westward on a curve to the north under the bridge, and thence westward on a curve to the south, but the degree of these curves is not stated. There are three tracks passing under the bridge, the first or south one is this lead track, the next one north of it is called the east-bound main track, and to the north of that is the west-bound main track. Both of these main tracks curve to the south after passing under the bridge going from the east to the west; but here again the degree of the curve is not stated. There is a spur track which leaves the middle or east-bound track at a point just west of the bridge and extends westward between that track and the lead track. At the time of the accident there were cars standing on the spur track at a point west of but near the bridge.

The plaintiff and his crew were engaged in moving a train of fifteen or more cars from the Seventeenth-street yards. After the engine and some six or eight cars passed under the bridge going west the plaintiff got off on the ground and stepped north some six or eight feet to and across the middle or east-bound track to a point some fifteen feet east of the bridge. He then looked west between the cars standing on the spur track and his train, then moving westward, and gave the engineer signals to stop and to back up. He then stepped back towards his train, and as he was clearing the east-bound track his foot was caught by the pilot of the engine of an east-bound passenger train, called the Kirkwood Accommodation. It was necessary for the plaintiff to get off his train and step over the track as he did in order to get in line with his engineer so as to give the signals. He says he could not see the incoming passenger train until it passed around

the cars standing on the spur, though some of his evidence tends to show that he could have seen the headlight of the engine drawing that train for a distance of one hundred and eighty feet from where he stood. He says he did not see the incoming train; that he just stepped across the track, gave his engineer a signal with his lantern to stop, then two signals to back up; that he then started back and was caught; and that it was all the work of a minute or thirty seconds. He says he knew this Kirkwood train came in every night, but that he had no time-card and did not know when it was due, and was not the foreman of his crew.

The evidence of the plaintiff and that of another witness is to the effect that this Kirkwood train was moving at a rate of speed from twenty to twenty-two miles per hour. The conductor of that train gave it as his opinion that his train was running at a speed not exceeding ten or twelve miles per hour, and assigns as a reason therefor that it was customary to slack up at the point where the accident occurred. He says his train was running on the time given by the time-card prepared and promulgated by the defendant. This time-card was put in evidence, and it calls for a rate of speed exceeding that specified in the ordinance. The ordinance is in these words: "Sec. 1233. It shall not be lawful within the limits of the city of St. Louis for any car, cars, or locomotives propelled by steam power, to run at a rate of speed exceeding six miles an hour; but nothing in this section shall be so construed as to apply to any car, cars, or locomotives running over track or tracks which are maintained along the river bank between Arsenal Street and Elwood street."

The case was submitted to the jury on this evidence produced by the plaintiff; and the first complaint is that the court erred in overruling the defendant's demurrer to the evidence. In this connection the defendant seeks to have the above ordinance ruled out of the case for these alleged reasons: 1. Because the right of the city of St. Louis to regulate the speed of railroad trains is implied from the express power conferred upon it to regulate the use of the street; hence, the ordinance should be construed as applying to streets and crossings only; 2. Because the ordinance was not designed for the protection of the defendant's employees, and the plaintiff can derive no benefit or protection therefrom.

1. As to the first of these propositions it may be observed that our attention has not been called to any provision of the

charter of the city of St. Louis which gives the city power, in terms, to regulate the speed of railroad trains; but the charter, among other things, gives the mayor and assembly power to regulate the use of streets; to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health; to declare, prevent, and abate nuisances on public or private property and the causes thereof; and to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures.

It is well to bear in mind that laws and ordinances regulating the speed of railroad trains are police regulations purely: *Grube v. Missouri Pac. R'y Co.*, 98 Mo. 331; 14 Am. St. Rep. 645; *Knobloch v. Chicago etc. R'y Co.*, 31 Minn. 402; *Toledo etc. R'y Co. v. Deacon*, 63 Ill. 91; *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625. As said in the case last cited: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." Indeed, regulating the speed of railroad trains is one of the many instances of an exercise of the police power given by Chief Justice Redfield in that case. The delegation of such a power to a municipal corporation need not be given in express terms. Says Judge Dillon: "Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restriction, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed": 2 Dillon on Municipal Corporations, 4th ed., sec. 713.

Speaking of the power of a city to prohibit the propelling of cars by steam through a city, Redfield says: "We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions": 2 Redfield on Railways, 5th ed., 577, 578. In *Chicago etc. R. R. Co. v. Haggerty*, 67 Ill. 113, objection was made to an ordinance limiting the rate of speed of trains within a town to not more than six miles per hour, on the ground that the town had no authority to pass it. The town had no express authority to regulate the speed of railroad trains, but the trustees had power to declare what should be considered a nuisance, and to prevent and remove the same, and to regulate

the police of the town, and to make such ordinances as the good of the inhabitants might require. "Under these powers," says the court, "we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens; and we view the ordinance in question as but a police regulation for the preservation of the safety of persons and property, the adoption of which was no more than a fair exercise of the police power vested in the town."

It is, therefore, clear that the argument that the ordinance in question should be construed as applying only to streets and crossings because the power to enact it is implied from the power to regulate the use of streets cannot stand the test of right, reason, or authority. It has no foundation upon which to stand; for the power to enact the ordinance does not depend alone, or to any considerable extent, upon the power to regulate the use of the streets. Trains of cars propelled by steam through a city, so as to be dangerous to persons and private property, may well be declared a nuisance: 2 Dillon on Municipal Corporations, sec. 713. Add to the nuisance clause the general welfare clause and there is then no doubt but the city of St. Louis had abundant authority to enact this ordinance.

The section of the ordinance now in question and another section thereof were before this court in *Merz v. Missouri Pac. R'y Co.*, 88 Mo. 672. That case was well presented, and after due consideration it was held that the ordinance was a valid enactment, and that it applied to tracks located on uninclosed private property of the defendant. In *Grube v. Missouri Pac. R'y Co.*, 98 Mo. 331, 14 Am. St. Rep. 645, a like ordinance was held to apply to uninclosed switch-yards in the exclusive use of the defendant. It is often said that ordinances requiring a bell to be rung or a flagman stationed at a crossing are designed for the benefit of persons traveling on the highway, but such ordinances are wholly unlike the one in hand. This ordinance makes no allusion to streets or to public or private grounds. It is an ordinance to limit the rate of speed of cars propelled by steam power within the limits of St. Louis, and this, too, without regard to any particular place. The only exception is that made by the ordinance itself. It is no more than a police regulation prescribing the manner in which defendant may use his property and franchise so as not to injure others. The defendant holds its property and franchise subject

to all such reasonable police regulations, and in this respect it stands on no other ground than an individual: *Ohio etc. R. R. Co. v. McClelland*, 25 Ill. 140; Tiedeman on Limitations of Police Power, sec. 194. We see no reason to depart from what has been said in prior cases, and we again hold that this ordinance applies to the defendant's switching-yards and main track as well as to other places. This conclusion finds direct support in what was said in *Crowley v. Burlington etc. R'y Co.*, 65 Iowa, 658. It was also said in *Whitson v. City of Franklin*, 34 Ind. 392, a case often cited, that "the fact that the railroad owned the lands over which the train was running constitutes no defense, nor could such fact be considered in mitigation of damages."

We do not regard the case of *State v. Jersey City*, 29 N. J. L. 170, as in conflict with what has been said. That case is made to turn upon the limitations contained in certain statute laws giving the city the power to regulate the speed of railroad cars and engines, and to declare what shall be considered nuisances. No such limitations are found in the charter of the city of St. Louis.

2. The next objection to the ordinance is, that it was not designed for the protection of the employees of the defendant, and hence they cannot have an action based upon its breach. The claim is, that the contract of employment determines the right, obligations, and duties existing between master and servant, and that these rights and obligations cannot be interfered with by an ordinance. In support of this position we are cited to the following extract: "The relation is purely one of contract, and the contract may contemplate or stipulate for any services and any conditions of service not absolutely unlawful": Cooley on Torts, 2d ed., 623. There is certainly nothing in this extract which would give any validity to an unlawful contract. Says the same author, when speaking of the police power of the state: "All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity": Cooley on Constitutional Limitations, 6th ed., 708.

A contract between master and servant to disregard and disobey this ordinance would be unlawful and void. It is

doubtless true that a servant engaged in disobeying the ordinance could not recover for injuries thus received, for he could not complain of his own wrong; but the plaintiff had nothing whatever to do with the running of this train at the unlawful rate of speed. The ordinance was enacted to protect the lives and property of the citizens, and is the law within the city limits. It furnishes a rule of conduct for master and servant as well as for other persons. It certainly cannot be said that plaintiff, by entering the service of the defendant, ceased to be under the protection of the laws of the city. The plaintiff was not a party to or a participant in the violation of the ordinance; and as the ordinance was enacted to protect the citizens and their property, he has a cause of action for the damages received, unless defeated by his own contributory negligence. It is agreed in this court that another section of the ordinance provides for the arrest and conviction of persons violating the section before set out, but we do not see what that has to do with the case in hand. The penalty thus imposed can no more affect this case than it would a case where a person not a servant of the company is suing for injuries sustained by reason of the excessive speed.

Nor is the plaintiff's action defeated because he and the persons in charge of the train were fellow-servants; for the train was run at a rate of speed prohibited by the ordinance, pursuant to a time-card prepared and promulgated by the defendant. The unlawful and negligent act was the joint act of the defendant and of the servants in charge of the train. The law is well settled that one servant may recover for an injury caused by the combined negligence of the master and a fellow-servant: *Young v. Shickle etc. Iron Co.*, 103 Mo. 324, and cases cited.

3. The next question is whether the court should, as a matter of law, have declared the plaintiff guilty of contributory negligence. It is to be observed at the outset that the plaintiff was not a trespasser or wrong-doer. At the time of this accident he was where he had a right to be, and where the performance of his duties required him to be, so that the cases of *Yancey v. Wabash etc. R'y Co.*, 93 Mo. 433, and *Barker v. Hannibal etc. R. R. Co.*, 98 Mo. 50, have no application to this case. Though his work placed him upon these tracks, still it was his duty to be on his guard for approaching trains; and the question is not whether there is evidence from which

the jury might have inferred contributory negligence, but whether the court should have so declared as a matter of law.

It is to be observed in the first place that under our rulings the burden of showing negligence on the part of the plaintiff is upon the defendant. The presumption is that plaintiff performed his duty until the contrary is made to appear: *Stepp v. Chicago etc. R'y Co.*, 85 Mo. 229; *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306; *Schlereth v. Missouri Pac. R'y Co.*, 96 Mo. 509. While some of the plaintiff's evidence is to the effect that he could have seen the approaching train for a distance of sixty yards from where he stood, still his evidence is that he could not see it until it had passed the cars standing on the spur track. He stepped over one set of rails, and his eyes were then necessarily turned in the direction of his engineer, and while thus looking and giving the signals he could not see the approaching passenger train because of the cars standing on the spur. Having given the signals to his engineer, he at once stepped back towards his train and was caught. The accident occurred at night, and these movements made by him were all the work of a minute or thirty seconds.

Taking these circumstances in connection with the evidence that the train was running at a speed of from twenty to twenty-two miles per hour, we think the question of contributory negligence was one for the jury. Where, as here, there is a flagrant violation of a law or municipal regulation, resulting in an injury, contributory negligence should be clearly made out, before the court relieves the defendant from liability on that ground: *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306. The evidence in our opinion does not make out a clear case of contributory negligence. The demurrer to the evidence was, therefore, properly overruled.

4. The third instruction given at the request of the defendant is, omitting some unimportant words, as follows: "If the jury find that plaintiff, while engaged in switching cars upon a freight train in the defendant's yard, stepped immediately in front of a passenger train of defendant, running east upon the east-bound track therein, and was struck thereby, he cannot recover, even though the passenger train was running at a rate of speed exceeding six miles per hour." This instruction, it will be seen, does not require the jury to find that plaintiff saw the approaching train, or could have seen it by the exercise of ordinary care. It submits no question of contributory negligence to the jury. It simply directs a verdict

for the defendant if plaintiff stepped immediately in front of the passenger train and was hurt, both of which facts were proved by the plaintiff's own evidence. When this instruction and the one given at the request of the plaintiff are applied to the evidence, as they must be, it is perfectly plain that they are in direct conflict; for if this instruction given at the request of the defendant presents the law correctly, then the plaintiff had no case, and could not recover. This instruction, in the light of the undisputed evidence of the plaintiff, was simply a demurrer to the evidence submitted to the jury. It is reversible error to give conflicting instructions, no matter at whose instance they are given. Such instructions furnish no guide to the jury: *Stevenson v. Hancock*, 72 Mo. 612.

It is unnecessary to go over all the instructions. Should it appear on a new trial that plaintiff saw the approaching train, and, seeing it, stepped in front of the engine, he cannot recover, for that would be gross negligence on his part; but if he did not see the approaching train, then it is for the jury to say whether he was wanting in ordinary care in not seeing it.

The judgment is reversed and the cause remanded.

SHERWOOD, C. J., is of the opinion that the judgment should be reversed, but does not agree to remanding the cause. The other judges concur.

MUNICIPAL CORPORATIONS. — ORDINANCE LIMITING SPEED OF RAILWAY TRAINS, when held valid under the general grant of police powers usually found in municipal charters: See *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320; *Cleveland R'y Co. v. Harrington*, 131 Ind. 426. An ordinance limiting the speed of trains to four miles an hour was held unreasonable, under the circumstances, in *Evison v. Chicago etc. R'y Co.*, 45 Minn. 370. For illustration of other ordinances regulating the use of streets by railway companies, see *City etc. R'y Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; 10 Am. St. Rep. 136.

MUNICIPAL CORPORATIONS CAN EXERCISE SUCH POWERS ONLY as are granted in express words, necessarily or fairly implied in or incident thereto, and those essential to its declared objects and purposes: *St. Louis v. Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; *Huesling v. Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129; *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490. In *Borough of Millersburg v. Bell*, 123 Pa. St. 151, it was held that the general powers conferred under a certain section of a borough law, "to make such laws, ordinances, by-laws, and regulations, not inconsistent with the laws of the commonwealth, as shall be deemed necessary for the good order and government of the borough," must be confined to the particular subjects referred to in the twenty-five succeeding paragraphs of the same section; but where general and special powers are granted, the power to pass by-laws under the general grant does not enlarge or annul the power granted by the special clause, but gives authority to pass

reasonable by-laws upon all other matters within the scope of municipal authority: *Huesing v. Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129.

NEGLIGENCE — NON-PERFORMANCE OF A DUTY IMPOSED BY LAW for the benefit of others renders the party failing to perform such duty liable to those for whose benefit it was imposed upon him: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698. Cases in which the violation of municipal ordinances by railway companies was held to be negligence *per se* are *Murray v. Missouri etc. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320; *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874; *Louisville etc. R. R. Co. v. Webb*, 90 Ala. 185; *Kelluy v. Missouri Pac. R'y Co.*, 101 Mo. 67; *Cleveland etc. R'y Co. v. Harrington*, 131 Ind. 426.

MASTER AND SERVANT. — NEGLIGENCE OF MASTER CONCURRING WITH THAT OF A FELLOW-SERVANT will render the master liable for injuries to a servant caused by such negligence: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Farren v. Sellers & Co.*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Franklin v. Winona etc. R. R. Co.*, 37 Minn. 409; 5 Am. St. Rep. 856; *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176; *Coppins v. New York etc. R. R. Co.*, 122 N. Y. 557; 19 Am. St. Rep. 523; *St. Louis etc. R'y Co. v. McClain*, 80 Tex. 85.

WILSON v. ST. LOUIS AND SAN FRANCISCO R'Y CO.

[108 MISSOURI, 588.]

NOTICE OF MOTION FOR EXECUTION AGAINST NON-RESIDENT STOCKHOLDER OF CORPORATION, SERVICE OF. — The notice of motion for an order that execution issue against a stockholder of a corporation, an execution against which has been returned unsatisfied, required by section 736 of the Revised Statutes of 1879 to be given to the person sought to be charged, must be a personal notice served within this state. Such a notice served upon a non-resident stockholder outside of this state is a nullity, and would be a nullity even if expressly authorized by the statute.

STRICT COMPLIANCE WITH STATUTORY DIRECTIONS ESSENTIAL, WHEN. — Wherever proceedings which differ from the course of the common law are intended to result in an adjudication, a strict compliance with all material directions of the statute is essential.

SERVICE OF PROCESS BY PUBLICATION, EFFECT OF. — Service of process by publication enables the court to give effect to a proceeding, so far only as it is one *in rem*.

JURISDICTION. — SERVICE OUTSIDE OF THE STATE OF NOTICE OR PROCESS, when not authorized by law, is a nullity.

JURISDICTION. — PROCEEDINGS DIFFERING FROM THE COURSE OF THE COMMON LAW are invalid unless all the material directions of the statute are strictly complied with.

JURISDICTION. — SERVICE OF PROCESS BEYOND THE STATE cannot authorize a personal judgment.

PROCESS, WHAT IS. — Any means of acquiring jurisdiction is properly designated process.

STOCKHOLDER NOT PARTY TO JUDGMENT AGAINST CORPORATION. — A stockholder is not, in any sense, a party to a judgment rendered against a

corporation of which he is a member, nor does such judgment bind his individual property.

MOTION FOR EXECUTION AGAINST STOCKHOLDER OF INSOLVENT CORPORATION, INDEPENDENT PROCEEDING. — A motion for execution against a stockholder of an insolvent corporation is an independent and original proceeding of which notice, proper in form and substance and served within the proper jurisdiction, must be given to the person sought to be charged.

PRESUMPTION UNFAVORABLE TO PARTY FAILING TO TESTIFY NOT WARRANTED, WHEN. — A presumption unfavorable to a defendant does not arise from his failing to appear and testify as to a matter of business, where it appears that the business was transacted through his subordinates, and that he was entirely unfamiliar with its details.

STOCK OF CORPORATION, TRANSFER OF, BY TRANSFER OF CERTIFICATE, VALIDITY OF. — A by-law of a corporation which prohibits the transfer of the stock of the corporation, except by a formal transfer on its books, does not, in the absence of a constitutional or statutory prohibition, render invalid a transfer of its stock by a transfer of the certificate thereof; and such a transfer is good against an execution creditor of the stockholder who did not have notice of the transfer when the execution was levied, but was notified of it before he purchased the stock, at a sale under the execution.

Botsford and Williams, for the plaintiff in error.

E. D. Kenna, for St. Louis and San Francisco Railroad Company.

James O. Broadhead and John O'Day, for Seligmans.

SHERWOOD, P. J. On the second day of April, 1883, in the circuit court of the city of St. Louis, plaintiff recovered judgment against the Memphis, Carthage, and Northwestern Railroad Company, for \$72,799.38; and execution on such judgment having been returned unsatisfied, that court on December 3, 1883, on motion made for that purpose, ordered and adjudged that execution issue against the defendants Seligman, on the date last mentioned. There was no appearance to this motion on the part of defendants Seligman, and it is a conceded fact that they never have been resident in this state, but have been, and still are, resident in the city of New York. Written notice of the intended application for execution and copies of the motion were served upon said defendants at their said residence.

Under the general execution thus issued, certain shares of stock, preferred and otherwise standing in the names of J. and W. Seligman & Co. on the stock-books of the defendant railway company, were levied on and sold on the eighteenth day of December, 1883, as the property of the defendants Seligman, plaintiff becoming the purchaser on that day, and he,

thereupon, instituted the present proceeding, which has for its object the entry of a judgment and decree of that court, compelling the defendant railway company to place the plaintiff's name on its transfer stock-books as the owner of the shares of stock described in the petition, and to permit him to exercise the usual rights incident to such ownership, and to have the right and title of the defendants Seligman decreed to be in plaintiff, by reason of his purchase aforesaid, etc.

The circuit court, on the evidence adduced at the hearing, dismissed the petition, and the plaintiff comes here on writ of error.

Other facts necessary and sufficient to an understanding of the cause will be noticed hereafter, as required.

1. It is claimed, in support of the validity of the execution sale, that the service of the notice and motion, though made in the state of New York; and upon persons there resident and never resident in this state, was legal, and gave the circuit court jurisdiction to award the execution.

Section 736 of the Revised Statutes of 1879, provides: "If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly; and provided further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

It is insisted that such service may be had as provided in section 3505 of the Revised Statutes of 1879, which reads this way: "Notices shall be in writing, and shall be served on the party or his attorney, in the manner prescribed in this article, unless otherwise provided by law. The service may be made by delivering to the party or his attorney a copy of such notice, or by leaving a copy at the usual place of abode of the party or his attorney, with some person over the age of fifteen years, or with the clerk of the party or his attorney." The next succeeding section (3506) provides: "If neither the ad-

verse party nor his attorney resides in this state, such notice may be put up in the office of the clerk of the court wherein the suit is pending or the proceedings are intended to be had."

It is plain from these statutory provisions, that they refer, as their terms would naturally import, to a suit then pending in a court which has already acquired jurisdiction of the party to be served with the notice; for the party thus intended to be served is spoken of in section 3506 as "the adverse party," and as having an "attorney," meaning an attorney of record. This language would obviously be without meaning where as yet there is neither litigation nor adverse parties, and consequently no attorneys of record, on whom notice could be served. Thus it will readily be seen that if the plaintiff's contention be correct, that this statute applies to the service of a notice in an instance like the present, then a service of such a notice would be equally good, as to non-residents, were it simply posted up in the clerk's office as provided in section 3506. In fact, in case of a non-resident party with a non-resident attorney, this would be the only method.

In the same chapter 21, where section 736 is found, section 751 occurs, which provides that "all notices, orders, and rules required to be served in the progress of any cause shall be served in like manner as in other civil cases." This section evidently refers also to interlocutory notices, etc., those "required in the progress of any cause," and not to those notices, etc., by which the action is begun. The statute in question really makes no provision for the method of the service of notice; it merely requires "sufficient notice in writing to the person sought to be charged." The evident object of the statute was to provide that the motion should be in the nature of an action at law, and governed by the usual incidents pertaining thereto; and, where the statute requires notice without any qualifications, personal notice must be given. "The doctrine of constructive notice is altogether the creature of statutory enactment, and has no existence until it receives legislative recognition": *Leach v. Cargill*, 60 Mo. 316. But the personal notice in this case, having been served outside of the state, has not been served according to law, for the statute nowhere permits or directs this sort of service, and therefore the notice in question was a nullity; because wherever service is had or notice given with the view of subse-

quent adjudication, such service or notice must comply with statutory requirements in order to possess any legal efficacy: *Allen v. Singer Mfg. Co.*, 72 Mo. 326, and cases cited. Mere service of notice, not according to law, brings no one into court, nor does mere knowledge on the part of the party notified of the pending proceedings have any more valid effect: *Potwine's Appeal*, 31 Conn. 381; Smith on Mercantile Law, 322. Wherever proceedings are intended to result in an adjudication, and such proceedings differ from the course of the common law, a strict compliance with all material directions of the statute is essential: Freeman on Judgments, 3d ed., sec. 127, and cases cited. No such compliance with the statute can be claimed here.

2. It will not be intended that the statute authorizes such a method of service as that on which plaintiff relies; but if the statute did, in terms, require the personal service of such notice outside of the state on a non-resident in order to the rendition of a personal judgment, or its equivalent, on a money demand, such statute would be wholly void as to such extra-territorial service. It scarcely requires to be stated that this position is sustained by abundant authority; indeed, it seems to be questioned by none. On this point Judge Cooley, after speaking of the validity of substituted service by publication, etc., says: "But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control of the state; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a state, and resides elsewhere, his property is justly subject to all

valid claims that may exist against him there; but, beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered": Cooley on Constitutional Limitations, 5th ed., 500, 501, and cases cited. See, also, *Town of Pana v. Bowler*, 107 U. S. 529; *Brooklyn v. Aetna L. Ins. Co.*, 99 U. S. 362; *Pennoyér v. Neff*, 95 U. S. 714; *Sim v. Frank*, 25 Ill. 125; Story on Conflict of Laws, sec. 546, et seq.

"The tribunals of one state have no jurisdiction over the persons of other states, unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of usurpation, without any binding efficacy. 'The authority of every judicial tribunal, and the obligation to obey it,' says Burge in his Commentaries, 'are circumscribed by the limits of the territory in which it is established'": *Galpin v. Page*, 18 Wall. *loc. cit.* 367.

Judge Story says: "Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for otherwise there can be no sovereignty exerted upon the known maxim, 'Extra territorium jus dicenti impune non paretur.' . . . On the other hand, no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals. This subject, however, deserves a more exact consideration": Story on Conflict of Laws, sec. 539.

Drake says: "But where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication of the pendency of the suit, will be void, and may be impeached collaterally or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it, notwithstanding the statute laws of the state expressly authorize a judgment to be rendered against a defendant under such circumstances. In cases of this description, while a levy on property would justify the exercise of jurisdiction, and the garnishment of one indebted to the defendant would be regarded, *per hoc vice*, as equivalent to a levy, yet the indebtedness of the garnishee must be shown;

and a judgment rendered against a garnishee who does not appear and answer, and against whom in such case the statute authorizes judgment to be rendered for the whole amount of the judgment against the defendant, without proof of his indebtedness to the defendant, will not sustain the jurisdiction": Drake on Attachments, 6th ed., sec. 449.

"Even if a state has passed a statute authorizing its courts to take jurisdiction of personal actions against debtors or others who cannot be reached by process, or of property actions, when the property cannot be seized, actually or constructively; and if the courts proceed accordingly, and render judgments, such judgments are not to be regarded by the courts of other states, nor by federal courts sitting within the state, nor by courts of the state itself, for the reason that no state can exercise power beyond its bounds, nor conclude persons or property beyond them. Such statutes have been passed, such power has been assumed and exercised in more than one state, though very rarely. Courts have been thus nominally authorized to take cognizance of personal actions against non-residents, after publication of notice, without personal summons, personal appearances, or attachment of property; but the supreme court of the United States has decided such proceedings under such a statute to be jurisdictionless, null, and void": Waples on Attachment, 339.

In *Smith v. McCutchen*, 38 Mo. 415, a judgment *in personam* for a debt was rendered upon a mere order of publication, and such judgment was held absolutely void, and that a party summoned as a garnishee upon such judgment could defend and show the invalidity of such judgment by reason of want of jurisdiction in the court to render it. To the same effect see, also, *Latimer v. Union Pac. R'y Co.*, 43 Mo. 105, 97 Am. Dec. 378, and numerous other authorities cited by defendants.

3. And it is entirely immaterial what is the means or method pointed out by the statute, or used in this instance, to acquire jurisdiction of the defendants Seligman, whether by writ or notice, it is properly denominated "process": 6 Complete Digest, 93; Anderson's Dictionary of Law, tit. "process"; *Dwight v. Merritt*, 18 Blatchf. 306; *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252. If process, then the necessity for such process being served in the method prescribed by law, and that such law and that such method does not attempt to extend jurisdiction beyond the proper territorial limits, is obvious. See 18 Blatchf. 306, and 19

Fed. Rep. 252, as well as former authorities. The process in this cause, being unknown to the law, as to its method of service, and as to its extraterritorial operation, if that method were otherwise legal, must be held as no process at all. See 18 Blatchf. 306, and 19 Fed. Rep. 252. Every subsequent step dependent thereon must, therefore, be deemed void. In concluding this paragraph, it may be remarked that section 736 requires "sufficient notice in writing to the person sought to be charged." In England, from whence that section was derived, it was held, prior to our statute being amended so as to be a copy of the English law, that such notice must be personal: *Ilfracombe R'y Co. v. Devon etc. R'y Co.*, L. R. 2 C. P. 15; *Edwards v. Kilkenny etc. R'y Co.*, 1 Com. B., N. S. 409. Under the operation of a familiar principle, this construction of the statute followed and attended its adoption in this state: *Skrainka v. Allen*, 76 Mo. 384; *Skouten v. Wood*, 57 Mo. 380; but for reasons already given, such service though personal was valueless, because made outside of our jurisdiction.

4. Nor is this case unfavorably altered for the defendants Seligman, because they are charged with being stockholders in the corporation against which the plaintiff recovered judgment. A stockholder is not, in any sense, a party to the judgment rendered against a corporation to which he may belong, nor does such judgment bind his property: *Hardwick v. Jones*, 65 Mo. 54; *Hannah v. Moberly Bank*, 67 Mo. 678; *Barclay v. Globe Mut. Ins. Co.*, 26 Mo. 490; *Whitman v. Cox*, 26 Me. 335; *Merchants' Bank v. Cook*, 4 Pick. 405; *Adams v. Wiscasset Bank*, 1 Greenl. 362; 10 Am. Dec 88. In *Blackman v. Central etc. R. R. Co.*, 58 Ga. 189, it was ruled that, upon a corporation being sued, a stockholder is not a party to the action, and not before the court; and in England, in *Hitchings v. Railway Co. (In re Emery)*, 20 L. J. Com. P. 31, where the proceeding was on the English statute already referred to by motion for judgment against a debtor of the corporation, Maule, J., says, in referring to a former case: "In that case it was held that the fact must be suggested upon the record. This is an attempt to charge a person in execution who is not a party on the record; [The principle of those decisions is that the party should have some opportunity for having the matter tried by a jury and bringing a writ of error if necessary;] and though the acts say that execution shall issue, they mean after the proper stages have been taken to make the person intended

to be charged a party to the record." This ruling was made in 1850.

Accepting these authorities as the correct guide, any proceeding against the stockholders subsequent to the judgment rendered against the corporation must be regarded as an original and independent proceeding, as much so as is garnishment process against a mere stranger to the record; but unless the service upon the garnishee be valid in form, and be served within the jurisdiction rendering the judgment, such judgment when rendered will not bind him: *Norvell v. Porter*, 62 Mo. 309; Drake on Attachments, 6th ed., sec. 451d; Thompson on Liability of Stockholders, secs. 357, 359; and in order to bind a stockholder in a corporation who is the debtor of such corporation, he must be subject to the process of the court by being found and served within its jurisdiction, and there sued just as a garnishee by having the garnishment process served upon him. Garnishment process is held to be a suit: Drake on Attachments, sec. 452; *McInts v. East St. Louis etc. Co.*, 89 Ill. 48.

The process against the defendants Seligman was in substance and effect a process of garnishment, since it sought to appropriate to the demand of the plaintiff whatever debt they might owe to the judgment debtor, the corporation: Drake on Attachments, sec. 452; Waples on Attachments, 342-345.

There are indeed strongly resemblant features between process which summons for judgment a stockholder and process which summons for a like purpose an ordinary party as garnishee. In either case, notwithstanding the proceeding is sometimes said to be auxiliary to the main one, yet in both the movement against the stockholder, as well as the garnishee, is an independent and original action, and so this court has treated it in regard to stockholders: *Erskine v. Loewenstein*, 82 Mo. 301; *State v. St. Louis Court of Appeals*, 87 Mo. 374; in which latter case it was ruled that a "motion for execution against a stockholder should be treated as a part of the record without being copied into the bill of exceptions." This ruling is alone consistent with the theory that such motions occupy a different plane from those motions which are interlocutory in their nature, and can only become a part of the record by being preserved in the bill of exceptions. In the former case it was held that a motion for execution was

in the nature of a suit in equity at common law to reach assets in the hands of the stockholder.

Any process, whether notice, writ, or motion, which, when served upon a party, will have the effect to authorize an order or judgment *in personam* against him, upon the rendition of which a general execution may issue leviable on all the property in the state of which he may be possessed, cannot be regarded in any other light, so far as that party is concerned, than as an independent proceeding. Were such a party sued in another form of action, no doubt could be entertained of the necessity for notice, proper in form and substance, and served within the proper jurisdiction in order to its validity. but in a summary proceeding under the statute, there are the same personal issues to try, to wit, whether the person sought to be charged is indeed a stockholder, and if he is indeed indebted to the insolvent corporation, and the same necessity for the observance of all the essentials necessary to the arrival at a correct conclusion, and in the end there is the same personal judgment to be entered if the proceedings are successful.

No substantial distinction can therefore be taken between the incidents which naturally accompany service of process in the two cases; whatever cause would invalidate the service of process in one instance would do so in the other; in either case the proper service of the process in all respects is essential to the jurisdiction of the court, and essential, also, in that it must meet the constitutional mandate respecting due process of law. The law regards the substance of things, not their shadows.

This is the view taken in Kansas on a statute which is virtually a copy of section 736, and there it was held that such a motion partakes of the nature of original process, and that, if served on a stockholder in Chicago, such service is invalid, and the party defendant may appear specially and have the resultant order vacated: *Howell v. Manglesdorf*, 33 Kan. 194. In that case the following apt quotation is approvingly made: "Where the object of the action is to obtain a judgment against the defendant upon which an execution may issue, to be levied generally of his goods and chattels or of his property, personal, real, and mixed, it is necessary at common law that there should be a personal notice, citation, summons, or subpœna, or that the defendant should voluntarily appear to the action. In cases of this character, such notice or ap-

pearance is indispensable to the jurisdiction of the court": Wade on Law of Notice, sec. 1137.

Various citations, which either directly or by necessary implication support the conclusions announced in the case just cited, will be found collated by the industry of counsel for defendants. Being well satisfied of the invalidity of the service of process in this case on the different grounds, constitutional and otherwise, already stated, it is deemed unnecessary to discuss in detail the authorities cited in opposition to these views; none of them, however, it is thought will be found, on careful examination, to announce a doctrine materially at variance with what has already been advanced, and if they did we should not be inclined to follow them.

But it may be said in concluding the discussion on this point that if, as already seen from the authorities cited, it is beyond the power of the legislature of a state to extend, even by express statutory enactment, the jurisdiction of its courts or to lengthen the reach of their process, then most certainly it would be wholly beyond the power of parties, by any contract made or consent given by them, to have a similar jurisdictional effect; an effect entirely beyond the power of the legislature to authorize; an effect which, once admitted, would immediately wipe out, not only state boundaries and constitutional provisions, but be limited alone by the boundaries of the habitable globe; for thus far, upon such a theory, would jurisdiction extend and process run. The base for such a theory of the law, it must be confessed, would be quite simple: 1. Given a contract made in any state by a non-resident thereof; 2. Imply a contract, based upon the former of submission to any jurisdiction the state where the contract is made may choose to have her courts assume over such contracting party or which such courts may assume, and the jurisdictional formula is complete.

5. Judge Thayer, before whom this cause was heard, found from the evidence that the defendants Seligman were not the owners of the stock in controversy at the time of the levy thereon, but that the same had been transferred prior thereto. After reading the evidence preserved in the record we have reached the same conclusion, and it would serve no useful purpose to set out the evidence in detail. On this point it seems uncontradicted. It is said, however, that the fact that the individual defendants to this proceeding failed to come upon the witness-stand and testify as to the transfer of the

stock in question is prejudicial to their cause; and *Baldwin v. Whitcomb*, 71 Mo. 658, and *Goldsby v. Johnson*, 82 Mo. 605, are cited as showing that from such failure unfavorable presumptions would be indulged against them; but in this case there is no foundation laid for such presumptions, because it clearly appears that the business of such defendants was transacted through their subordinates, with the details of which business they evidently were entirely unfamiliar.

6. The next point for discussion is whether the plaintiff acquired any title to the stock in question by reason of his purchase at the execution sale. It is insisted on his behalf that he acquired a good title by reason of his purchase, and in this connection certain constitutional and statutory provisions are relied upon, as well as certain by-laws of the defendant corporation.

The constitutional provision, article 12, section 15, is the following: "Every railroad or other corporation organized or doing business in this state, under the laws or authority thereof, shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made, and where shall be kept for public inspection books in which shall be recorded the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of said stock, with the date of transfer, the amount of its assets and liabilities and the names and places of residence of its officers. . . ."

The statutory provisions, except as already quoted, are these (Rev. Stats. 1879, c. 21):—

"Sec. 706. Every corporation, as such, has power:

6. To make by-laws not inconsistent with existing laws, for the transfer of its stock."

"Sec. 714. In all cases where the right to vote upon any share or shares of the stock in any incorporated company shall be questioned, it shall be the duty of the inspectors to require the transfer-books of such corporation as evidence of stock held in such corporation, and all shares that may appear standing thereon in the name of any person or persons shall be voted upon by such person or persons directly by themselves or by proxy.

"Sec. 715. At every election of directors the transfer-books of the corporation shall be produced to test the qualifications of the voters; and no person shall be admitted to vote, directly

or by proxy, except those in whose names the shares of the stock of the corporation shall stand on such books, and shall have so stood for at least thirty days previous to the election."

"Sec. 720. Every such corporation shall keep a book in which the transfer of shares of its stock shall be registered, and another book containing the names of its stockholders, which book shall at all times, during the usual hours of business, for thirty days previous to an election of directors, be open to the examination of the stockholders."

"Sec. 737. The clerk or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence, so far as to him known, and the amount of liability, of every person liable as aforesaid."

"Sec. 739. The stock of every company formed under this act shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the company; but no shares shall be transferred until all previous calls thereon shall have been fully paid."

"Sec. 841. Every railroad company, incorporated or doing business in this state, . . . shall . . . annually . . . on or before the first day of August, transmit to the office of the railroad commissioners a full and true statement, under oath of the proper officers of said corporation, of the affairs of the corporation, as the same existed on the first day of the preceding July, specifying: 1. The amount of capital stock subscribed, the number of shares, and the par value thereof; 2. The names of the owners of its stock, the amount owned by them respectively, and the residence of each stockholder, as far as known."

"Rev. Stats. 1879, c. 32, sec. 2354. The following property shall be liable to be seized and sold upon attachment and execution issued from any court of record: . . . 2. All the rights and shares in the stock of any bank, insurance company, or other corporation, . . ."

"Sec. 2363. When an execution shall be issued against any person being the owner of any shares or stock in any bank, insurance company, or other corporation, it shall be the duty of the cashier, secretary, or chief clerk of such bank, insurance company, or other corporation, upon the request of the officer having such execution, to furnish him a certificate, under his hand, stating the number of rights or shares the defendant

holds in the stock of such bank, company, or corporation with the encumbrance thereon.

"Sec. 2364. The officer, upon obtaining such information, or in any other manner, may make a levy of such execution on such rights or shares by leaving a true copy of such writ with the cashier, secretary, or chief clerk; and, if there be no such officer, then with some other officer of such bank, company, or corporation, with an attested certificate by the officer making the levy that he levies upon and takes such rights and shares to satisfy such execution."

Section 2370 provides that ten days' notice of time, terms, and place of sale are to be given by the officer holding the execution.

"Sec. 2391. When any rights or shares of stock in any bank, company, or corporation shall be sold, the officer making such sale shall execute an instrument in writing, reciting the sale and payment of the consideration, and conveying to the purchaser such rights and shares; and shall also leave with the cashier, secretary, or chief clerk, or if there be none, with any other officer of such bank, corporation, or company, a copy of the execution and his return thereon; and the purchaser shall thereupon be entitled to all dividends and stock and to the same privileges as a member of such company or corporation as such debtor was entitled to."

The by-laws of defendant corporation, relating to the transfer of its capital stock in force at the time of the levy and sale of the stock in controversy, are as follows:—

"Art. 3, sec. 6. At every election of directors the transfer-books of the corporation shall be produced to test the qualification of the voters; and no person shall be admitted to vote, directly or by proxy, except those in whose names the shares of the stock of the corporation shall stand on such books, and shall have so stood for at least thirty days previous to the election."

"Art. 12, sec. 2. No transfer of stock shall be allowed except by stockholders in person, or by a properly constituted attorney, whose power shall be duly executed and filed with the company.

"Sec. 3. At the time of the transfer of any stock the old certificates shall be surrendered and canceled before new certificates are issued therefor."

Under these provisions plaintiff claims that the stock-books of the defendant corporation, showing the defendants Selig

man to be the owners of the stock in question, at the time of the levy of execution on such shares, that such ownership was to be determined alone by such books, and that, in consequence, the plaintiff acquired a good title by his purchase.

It is evident that the constitution makes no inhibition on the transfer of the stock of a corporation in other modes than the formal one upon its books, nor does the statute prohibit the usual method of transfer, to wit, by the transfer of the certificate. The by-laws, it seems in this instance, make such prohibition; but the general current of authority admits the validity of transfers made outside of the books of the corporation, some adjudications holding that such transfer, though not recorded on the books, passes the legal title; and it is generally held that such regulations made in the by-laws are made for the benefit, protection, and convenience of the corporation itself, and not for third parties, and that they do not incapacitate the stockholder from parting with his interest, and that his assignment, though not on the books, passes his entire title to the stock. This ruling appears to be in accordance with a custom generally if not universally prevalent in the commercial world; a custom which should not be lightly disturbed by the courts.

There is much authority also for saying that such transfers are good, even as against attaching or execution creditors, such creditors being held to obtain only such title as the debtor had at the time of the levy. In *Merchant's Nat. Bank v. Richards*, 6 Mo. App. 454, afterwards approved by this court, 74 Mo. 77, it was held that an attaching creditor cannot prevail against a prior *bona fide* purchaser whose purchase has not been entered on the books, although such transfer was unknown to the creditor at the time the attachment was levied, though the attaching creditor at the time of his purchase became aware of the transfer, and it was ruled in that case that the unregistered purchaser had the superior equity, and several cases in this court were approvingly cited: *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 150; *Chouteau Springs Co. v. Harris*, 20 Mo. 382; *Boatmen's Ins. & Trust Co. v. Able*, 48 Mo. 136; *Moore v. Bank*, 52 Mo. 379. Numerous authorities cited by counsel for the defendants support the same conclusion.

That ruling is also well supported by analogous rulings respecting a levy on real estate where there is an unrecorded deed, but which is put to record prior to the execution sale, and where it is held that such deed will prevail over any sup-

posed title acquired at such sale: *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105; *Black v. Long*, 60 Mo. 181; *Crow v. Drace*, 61 Mo. 225.

Here, though it be granted that the plaintiff had no notice at the time the execution was levied, yet this was not the case at the time of his purchase when he was duly notified. In these circumstances he cannot justly lay claim to being a *bona fide* purchaser as against the unregistered shareholders who hold the outstanding certificates; and such outstanding certificates being in the hands of prior purchasers, who also hold powers of attorney from the registered shareholders to execute written transfers on the books of the defendant corporation, constitute a valid ground for that corporation to defend this action; for otherwise that corporation might incur a double liability.

The considerations aforesaid lead to an affirmance of the judgment, and it is so ordered.

BLACK and BRACE, J.J., concur in all that has been said.

BARCLAY, J., concurs in paragraphs 5 and 6, and expresses no opinion on the other points.

JURISDICTION OF NON-RESIDENTS. — A person not domiciled in a state cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits to the jurisdiction of its courts by appearing in some manner in the action or proceeding instituted against him: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; and where it affirmatively appears that the defendant was a non-resident, and the record is silent as to his appearance or notice, no presumption arises that jurisdiction was acquired: *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808. See also the extended notes to *Alley v. Caspari*, 6 Am. St. Rep. 183, and *Hood v. State*, 26 Am. Rep. 29.

STRICT COMPLIANCE WITH STATUTORY DIRECTIONS, WHEN ESSENTIAL. — The necessity of strict compliance with enactments modifying the course of common law in regard to legal proceedings is most frequently exemplified in the case of service of process on non-residents by publication: See *Zecharie v. Boucers*, 1 Smedes & M. 584; 40 Am. Dec. 111; *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278; *Becket v. Cuenin*, 15 Col. 281; 22 Am. St. Rep. 399; and note to *Shepherd v. Ware*, 24 Am. St. Rep. 217.

JUDGMENT AGAINST CORPORATION, WHETHER STOCKHOLDERS ARE BOUND BY: See note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 814, 833; *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156; *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; *Brines v. Babcock*, 95 Cal. 551; 29 Am. St. Rep. 158.

WITNESSES, CREDIBILITY OF — REFUSAL TO TESTIFY. — The failure of the defendant in a criminal case to testify will not raise any presumption against him: See note to *People v. Mullings*, 17 Am. St. Rep. 230.

CORPORATIONS — VALIDITY OF TRANSFERS OF STOCK NOT ENTERED ON THE BOOKS: See notes to *Dickinson v. Central Nat. Bank*, 37 Am. Rep. 353-356; *Nicollet Nat. Bank v. City Bank*, 8 Am. St. Rep. 647; *Jennings v. Bank*, 12 Am. St. Rep. 152. A clause in the charter to the effect that stock is assignable only on the books of the company, is for the benefit of the corporation, and transfers without entry on the books are good between vendor and vendee: *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; *Bank of Utica v. Smalley*, 2 Cow. 770; 14 Am. Dec. 526; *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. For the rule under statutes, see *Weston v. Bear River etc. Mining Co.*, 5 Cal. 186; 63 Am. Dec. 117; *Fort Madison Lumber Co. v. Batavia Bank*, 71 Iowa, 270; 60 Am. Rep. 789; *Bultrick v. Nashua etc. R. R. Co.*, 62 N. H. 413; 13 Am. St. Rep. 578; *Harpold v. Stobart*, 46 Ohio St. 397; 15 Am. St. Rep. 618. In *Lippitt v. American etc. Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, the rule that such a transfer does not pass the legal title was adhered to.

STATE v. DAVIS.

[108 MISSOURI, 666.]

CONSTITUTIONAL LAW — PRIVATE PAPERS PROTECTED FROM SEIZURE. —

The constitutional provision "that no person shall be compelled to testify against himself in a criminal cause," precludes the seizure of one's private books and papers in order to obtain evidence against him.

PRESCRIPTIONS REQUIRED TO BE KEPT BY DRUGGISTS NOT PRIVATE PAPERS.

The prescriptions required by section 4622 of the Revised Statutes of 1889, of Missouri, to be kept by druggists and produced before courts or grand juries, are not private papers of the druggists, and the law imposing the duty of preserving and producing them is not unconstitutional.

THE opinion states the case.

John M. Wood, attorney-general, and *G. A. Chapman*, for the state.

W. D. Hamilton, for the respondent.

MACFARLANE, J. This case comes to this court on the appeal of the state from a judgment of the circuit court of Daviess County sustaining a demurrer to the indictment.

Defendant was indicted as a druggist and pharmacist, under section 4622, for refusing to produce before the grand jury of the county the prescriptions filled by him during the previous year, when lawfully summoned to do so. A demurrer to this indictment was sustained on the ground that said section, in requiring defendant to produce the prescriptions before the grand jury, was in conflict with section 23 of the bill of rights under the constitution of this state, and the fifth amendment to the constitution of the United States, in that it required him to furnish evidence against himself.

Section 4621, Revised Statutes, 1889, prohibits druggists or

proprietors of drug stores or pharmacists from selling intoxicating liquors in less quantities than four gallons, except on a written prescription, dated and signed, first had and obtained from some regularly registered and practicing physician, and then only when such physician shall state in such prescription the name of the person for whom the same is prescribed, and that such intoxicating liquor is prescribed as a necessary remedy.

Section 4622 is as follows: "Every druggist, proprietor of a drug store, or pharmacist shall carefully preserve all prescriptions compounded by him or those in his employ, numbering, dating, and filing them in the order in which they are compounded, and shall produce the same in court or before any grand jury whenever thereto lawfully required, and on failing, neglecting, or refusing so to do, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not less than fifty dollars nor more than one hundred dollars."

The terms of section 23 of article 2 of our state constitution, "that no person shall be compelled to testify against himself in a criminal cause," has uniformly received from the courts a construction which would give to the citizen protection as broad as that afforded under the common-law principle from which they were derived. Lord Camden, as early as 1762, in his celebrated opinion in case of *Entick v. Carrington*, 19 How. St. Tr. 1029, in speaking of the right of search and seizure of private books and papers, uses this language: "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 616, pronounces this opinion of Lord Camden as being one of the permanent monuments of the English constitution, and in approval of the principles therein announced says: "Breaking into a house, and opening boxes and drawers are circum-

stances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers, to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment"; and, again, on page 633, he says: "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

We entertain no doubt that the spirit of the constitutional protection, "that no person shall be compelled to testify against himself in a criminal cause," also precludes the seizure of one's private books and papers in order to obtain evidence against him. Cooley on Constitutional Limitations, 370; Wharton on Evidence, sec. 751. Do prescriptions of druggists under section 4622 come within that class of private papers thus shielded from inspection by the constitution? We think not.

The right to sell intoxicating liquors is not a right or privilege accorded to every citizen. The state has the right to control, regulate, or altogether prohibit its sale. It has, therefore, the undoubted right to impose such conditions upon those whom it may authorize to sell such liquors as it may deem necessary to properly regulate and control its use: *Austin v. State*, 10 Mo. 591. Druggists are not given an unlimited right to sell intoxicating liquors. This right is granted to another class of dealers under the laws of this state. For their privilege they pay a much higher tax than is required of druggists, give bond for a compliance with the stringent conditions imposed upon them, and are made subject to heavy penalties for a violation of such conditions.

But intoxicating liquor is, by many physicians, considered a necessary medicine in the treatment of diseases. It was, therefore, deemed necessary that druggists in compounding medicines and filling prescriptions should have the right to sell liquor as a medicine. There can be no doubt that the legislature had the right to impose its own conditions in authorizing such sales. It undertook to do so by the provisions of section 4621, which limits sales to those made under the written prescription of a regularly registered and practicing physician.

To prevent abuse of their authority to sell, and to prevent

their use of such authority as a covering under which to make unlawful sales, section 4622 requires the druggist to preserve all such prescriptions, and produce them in court, or before the grand jury, when lawfully required. This duty was imposed as a condition upon which a sale was authorized. These prescriptions thus became the license, or justification, to the druggist for making sales, which would otherwise be unlawful. As evidence of authority to make particular sales they would constitute private papers of the druggist, but could not be regarded as evidence of crime, but rather of innocence. The chief purpose of their preservation, however, was evidently that they might be used in giving aid to courts and grand juries in their proper and lawful endeavors to control and regulate the sale of intoxicating liquors within the limits prescribed by the legislature, and in the investigation of matters of public concern. In these respects all the prescriptions become public and not private papers, and the druggist merely their custodian.

It could not be insisted that the production of the official books of a collector, treasurer, or other public officer could not be required in the investigation of his accounts, or used in evidence against him in a prosecution for official misconduct. The obvious reason is that the books are not the private property of the citizen, but the public records required to be kept by the officer.

The law imposing the duty upon druggists of preserving the prescriptions of physicians left with them, and of producing them before courts or grand juries, is as clearly required as the duty imposed by law upon any public officer to keep an account of the public money which passes through his hands.

Our conclusion is that section 4622 is constitutional, and all its requirements may be lawfully enforced.

Judgment reversed and cause remanded. All concur.

RIGHT OF PERSON TO PROTECTION OF BOOKS AND PAPERS FROM EXAMINATION. — The fourth amendment to the constitution of the United States provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and it is provided in the fifth amendment that "no person . . . shall be compelled in any criminal case to be a witness against himself." Both these provisions are intended to secure the personal liberty of the citizen. They are intimately connected with each other, the one almost running into the other. Any forcible extortion of a man's own testimony or of his private books or papers to be used as evidence to convict him of crime or to forfeit his goods, is prohibited by the fifth amendment; and when

the object of a search or seizure of a man's books and papers or of a compulsory production of them, which is equivalent to such search or seizure, is to use them as evidence against him in a prosecution for crime, or in a proceeding for the imposition upon him of a penalty or forfeiture, such search and seizure are "unreasonable," within the meaning of the fourth amendment: *Boyd v. United States*, 116 U. S. 616. Mr. Justice Bradley, in delivering the opinion of the court in that case, said: "We have been unable to perceive that the seizure of a man's private books to be used in evidence against him is substantially different from compelling him to be a witness against himself."

The provisions above quoted are, of course, limitations upon the federal power only, and not upon the power of a state. They have no application to proceedings under the authority of a state: *Reed v. Rice*, 2 J. J. Marsh, 44; 19 Am. Dec. 122; *Weimer v. Bunbury*, 30 Mich. 201; *State v. Brennan*, Sup. Ct. S. Dak., Dec. 22, 1891. The decisions of the federal courts construing these provisions are, however, of importance even in proceedings in the state courts, because similar provisions have been incorporated into the constitutions of the several states. It has been remarked by a prominent legal author that although these provisions are of great importance as guaranties of private right against lawless invasion, but very few cases have arisen in regard to them: Sedgwick on Constitutional and Statutory Construction, 2d ed, 500. This fact is in itself flattering evidence of the mildness and fairness of the legislation and administration of the government of the United States, and of the governments of the various states of the union, ever since the adoption of the federal constitution. The great principles embodied in these provisions had become firmly established in the English constitution, a few years before the outbreak of the Revolutionary War. The great constitutional struggle in England, which culminated in 1766 in the House of Commons passing resolutions condemning general warrants for the seizure of persons or of their books or papers, is one of the most memorable in the history of that country. A practice had gradually crept into the administration of the English government for the secretary of state to issue general warrants for searching private houses for the discovery and seizure of books and papers that might be used to convict their owners of charges of libel. John Wilkes published in No. 45 of the North Briton severe strictures upon the government, which were deemed to be heinously libelous. Lord Halifax, the secretary of state, issued general warrants under the authority of which the houses of Wilkes and others were searched and their private books and papers were seized. Several suits grew out of this outrage, which were tried before Chief-justice Pratt, afterwards Lord Camden, in the court of common pleas, and one of them was carried by writ of error to the court of King's bench, where the judgment was affirmed by Lord Mansfield. It was decided in these cases that the seizure of private papers under a general warrant in a case of libel was illegal: *Huckle v. Money*, 2 Wils. 205; *Entick v. Carrington*, 2 Wils. 275; 19 How. St. Tr. 1029; *Wilkes v. Wood*, 19 How. St. Tr. 1153; *Money v. Leach*, 3 Burr. 1743. In *Huckle v. Money*, 2 Wils. 207, Chief-justice Pratt said: "To enter a man's house by virtue of a nameless warrant, in order to secure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack upon the liberty of the subject." These decisions were applauded by the friends of liberty in the colonies as well as in England. The colonists, as early as 1761, had protested against the practice which had grown up in the colonies of issuing writs of assistance to

the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and James Otis characterized this practice as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."

The history of the events briefly referred to above was fresh in the minds of the framers of the fourth and fifth amendments to the constitution, and this fact tends to explain what is meant by unreasonable searches and seizures in the fourth amendment. The provisions of the constitution under consideration laid down no new doctrine, for it had already been decided in England that a person cannot be compelled to allow another to inspect books or papers of a private nature in his custody and control, where in doing so he would be furnishing evidence against himself to be used in a criminal proceeding: *Rex v. Purnell*, 1 Wils. 239; *Regina v. Mead*, 2 Ld. Raym. 927; *Rex v. Cornelius*, 2 Strange, 1210. See also *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547; *Johnson v. Donaldson*, 18 Blatchf. 287; *Gray v. Kimball*, 42 Me. 299. These principles have been vigorously upheld by American writers on constitutional law, who have condemned all laws passed in derogation of them: 2 Story on the Constitution, secs. 1901, 1902; Cooley on Constitutional Limitations, 299 et seq.; Cooley on Principles of Constitutional Law, 220; 2 Hare's American Constitutional Law, 830. Judge Cooley says: "It is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, — and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety. In principle, they are objectionable, in the mode of execution they are necessarily odious, and they tend to invite abuse and to cover the commission of crime. We think it would generally be safe for the legislature to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies": Cooley on Constitutional Limitations, 306, 307.

The most important judicial decision upon the subject under consideration is that of the supreme court of the United States in the case of *Boyd v. United States*, 116 U. S. 616. That was an information filed by the district attorney of the United States in the district court for the southern district of New York, for the forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the act of Congress of June 22, 1874. The 5th section of that act provided that "In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion,

shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court; and if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States; but the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." The supreme court held this section to be unconstitutional and void, because it is repugnant to the fourth and fifth amendments to the constitution. A proceeding to forfeit a person's goods for an offense against the laws, though civil in form, was held to be criminal case within the meaning of the fifth amendment, whether such proceeding was *in rem* or *in personam*; and it was also held that a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit of the fourth amendment. Such production is equivalent to an unreasonable search and seizure. The learned justice who delivered the opinion of the court pointed out the difference between the search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, and the search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. In the one case the government is entitled to the possession of the property, in the other it is not. He pointed out the fact that the seizure of stolen goods is authorized by the common law, and that the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past, and that like seizures have been authorized by our own revenue acts from the commencement of the government. Such seizures were, therefore, clearly not regarded as "unreasonable" by the framers of the original amendments to the constitution, and are not embraced within the prohibition of the fourth amendment; and he adds: "So also the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So also the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category." In *Commonwealth v. Watts*, 84 Ky. 537, it was held that all seizures and searches are not prohibited by the Kentucky constitution, but are impliedly recognized, except those that are unreasonable; and in *Langdon v. People*, 133 Ill. 382, it was held that the constitution of Illinois does not prohibit all searches and seizures of a man's papers or other possessions, but such only as are "unreasonable," and the foundation of which is not previously supported by oath or affirmation; and among things that may be searched for and seized without violating the bill of rights of

that state are "books and papers of a public character, retained from their proper custody, . . . and forged bills or papers"; and in that case it was decided that where a prosecuting officer obtains a search warrant in strict conformity with law to search the office of a party in prison on a charge of forgery, and certain papers bearing on the question of the party's guilt are found, they may be used in evidence against him on his trial without violating his constitutional right to be secure in his papers and effects against unreasonable search and seizure. So, too, in *Commonwealth v. Dana*, 2 Met. 329, it was decided that books kept in relation to the proceedings respecting a lottery are "materials for a lottery" within the meaning of the Massachusetts statute, and may be seized under a search-warrant.

PRODUCTION OF BOOKS AND PAPERS IN CIVIL CASES. — In all proceedings of a purely civil character, a witness or a party to the action may be compelled to produce books or papers in his possession or under his control to be inspected by the opposite party and to be used as evidence on the trial. By the English Statute of 14 and 15 Vict. c. 99, it is provided that in the courts of common law an application of either of the litigants, the court may compel the opposite party to allow his adversary to inspect all documents in the possession of the former, and if necessary to make copies of them, in all cases in which, previous to the passage of that act, a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity: Pollock on Power of Courts of Common Law to compel the Production of Documents for Inspection, 5. In this country the general practice is to compel such production by means of a *subpoena duces tecum*: *Martin v. Williams*, 18 Ala. 190; *Burnham v. Morrissey*, 14 Gray, 226; 74 Am. Dec. 676; *Chaplain v. Briscoe*, 5 Smedes & M. 198; *Murray v. Elston*, 23 N. J. Eq. 212; *Bonesteel v. Lynde*, 8 How. Pr. 226; *People v. Dyckman*, 24 How. Pr. 222; *Central Nat. Bank v. Arthur*, 2 Sweeny, 194; but in *Campbell v. Johnston*, 3 Del. Ch. 94, it was held that the production of a document in possession of the adverse party cannot be compelled under a *subpoena duces tecum*, instead of by a cross-bill; and in *Duke v. Brown*, 18 Ind. 111, it was decided that under the statute of that state a party to an action cannot be compelled by the mere service upon him of a *subpoena duces tecum* issued *ex parte*, to produce his books on the trial for evidence or inspection; but that such production can only be enforced by an order which must be made by the court or a judge thereof, upon due notice to the adverse party. A similar decision was rendered in *Trotter v. Lutson*, 7 How. Pr. 261, but that case has been overruled by the later New York cases above cited. A witness upon whom a *subpoena duces tecum* has been served must produce all books and documents in his possession, unless he has a reasonable excuse for not doing so, of the validity of which the court, and not the witness, is to judge: *Chaplain v. Briscoe*, 5 Smedes & M. 198. A *subpoena duces tecum* merely commanding a party to appear at a certain place and time named in the writ and bring with him a certain book, but omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt: *Murray v. Elston*, 23 N. J. Eq. 212; but where a witness is subpoenaed, as well to testify as to bring his papers into court, the party at whose instance the subpoena issues may require the production of the papers without introducing the witness generally: *Martin v. Williams*, 18 Ala. 190. It seems that this right of discovery is limited to material facts relating to the party's own case, and does not extend to evidence which relates to his adversary's case: Pollock on Power of Courts of Common Law to compel the Production of Documents for Inspection, 14; *Wright v. Moxey*, 11 D.C.

209; *Central etc. R. R. Co. v. Twenty-third St. R'y Co.*, 53 How. Pr. 45. A court will not compel a party on motion to produce papers, until it appears that he has them under his control: *Hall v. Young*, 37 N. H. 134. A clerk in a bank is not bound to produce its books on a *subpoena duces tecum*, where they were not under his control, but that of the cashier: *Bank of Utica v. Hillard*, 5 Cow. 153. A corporation may be compelled to produce books and papers in like manner as if it were a natural person: *Central etc. R. R. Co. v. Twenty-third St. R'y Co.*, 53 How. Pr. 45; *Wertheim v. Continental R'y & T. Co.*, 21 Blatchf. 246. An attorney or a physician is not bound to produce books or papers containing privileged communications between him and his client or patient, to be used as evidence on a trial: Pollock on Power of Court of Common Law to compel the Production of Documents for Inspection, 37; *Rez v. Dixon*, 3 Burr. 1687; *Mott v. Consumer's Ice Co.*, 52 How. Pr. 148, 244; but it is the province of the court, and not of an attorney summoned by *subpoena duces tecum* to produce papers admitted to be in his possession, to determine whether they are privileged or not: *Mitchell's Case*, 12 Abb. Pr. 249.

Telegrams are not privileged communications, but may be called for and given in evidence whenever, in the opinion of the court, they are proper testimony to promote the ends of justice; and the telegraph operator may be compelled to produce them: *Woods v. Miller*, 55 Iowa, 168; 39 Am. Rep. 170; *State v. Litchfield*, 58 Me. 267; *Ex parte Brown*, 72 Mo. 83; 37 Am. Rep. 426; *National Bank v. National Bank*, 7 W. Va. 544; *United States v. Hunter*, 15 Fed. Rep. 712; but letters in the United States mail are secure from search: *Ex parte Jackson*, 96 U. S. 727. A legislature or a commission appointed by it to make an investigation may compel a witness to produce books or papers before it: *People v. Learned*, 5 Hun, 626; *Burnham v. Morrissey*, 14 Gray, 226; 74 Am. Dec. 676.

FONTAINE v. SCHULENBURG AND BOECKLER LUMBER COMPANY.

[109 MISSOURI, 55.]

DAMAGES — MEASURE OF AGAINST TENANT FOR FAILURE TO PAY TAXES. —

When a tenant agrees to pay all taxes assessed against the land in lieu of rent, his failure to pay such taxes, resulting in the sale of the land therefor, renders him liable in damages only for the amount of unpaid taxes, with interest thereon.

LANDLORD AND TENANT — AGREEMENT BY TENANT TO PAY TAXES — LIABILITY OF SUCCESSOR. — When a tenant covenants to pay taxes on the leased land in lieu of rent, his successor in interest under the same lease is liable for all taxes unpaid at the time the latter took possession.

LANDLORD AND TENANT — AGREEMENT BY TENANT TO PAY TAXES — LESSOR'S TITLE. — When a lease from a trustee provides that the tenant shall be liable for the taxes on the leased land in lieu of rent, the successor in interest of such tenant under the lease is liable for all taxes unpaid at the time he took possession, in an action brought by one holding title from such trustee.

MORTGAGE — WHAT CONSTITUTES. — A CONVEYANCE IN TRUST to protect and save harmless the sureties on a bond given by the grantor, and bind-

ing the latter at her death to pay a certain sum to the heirs of her deceased husband, is a mortgage.

MORTGAGE — POSSESSION AND RENTS, WHO ENTITLED TO. — A mortgagor or his heirs are entitled to the possession and rents until the mortgagee enters for condition broken.

E. T. Farish, for the plaintiffs, appellants.

Rudolph Schulenburg, for the defendant, appellant.

BLACK, J. The plaintiffs aver that they were the owners of lot 98 in block 31 of North St. Louis; that the defendant corporation occupied the lot in 1879 as their tenant, under an agreement to pay the taxes assessed thereon as a rental therefor; that the defendant suffered and allowed the lot to be sold for the taxes of 1879, amounting to sixty-four dollars, whereby they lost their property; that the lot was of the value of five thousand dollars, and for this amount they ask judgment. The court gave judgment for plaintiffs for \$102.07, the amount of the taxes and interests thereon, and from that judgment both sides appealed.

The evidence shows that on the 10th of December, 1842, Mary O. Smith, by her deed of that date, conveyed this and another lot to Major C. Cheatam in trust for Henry B. Brickell and Lemuel Smith, Jr. This deed states that Brickell and Smith are bound as the sureties of Mary O. Smith on a bond given by her for the use and benefit of the heirs of Nicholas P. Smith, for the sum of \$4,315, due at the death of said Mary O. Smith; that owing to the amount of debts against her the sureties will in all probability have to pay the bond at her death; that to indemnify them from pecuniary harm she conveys the lot to Cheatam "in trust, however, as aforesaid, to the intent and purpose that said Henry B. Brickell and Lemuel Smith, Jr., shall have the possession of the lots, and the exclusive control and management of the same, and be entitled to all the profits and rents arising from the rent or improvement of the said lot; and the said Major C. Cheatam shall, at the death of said Mary O. Smith, or at any time after her death, as the said Henry B. Brickell and Lemuel Smith, Jr., may appoint, make and convey such title as is vested in him by this instrument to any person or persons whom the said Henry B. Brickell and Lemuel Smith, Jr., may designate."

Brickell and Major Cheatam married daughters of Mary O. Smith, and Lemuel Smith, Jr., was her son. Lemuel Smith, Jr., died in 1813, Brickell died prior to 1868, Mary O. Smith

died in May, 1868, and Major Cheatam died in 1873. The plaintiffs in this case are not the persons upon whom descent was cast at the death of Mary O. Smith, as is alleged in the petition, but they are heirs of and purchasers from the heirs of such persons. Between 1855 and 1860, Major Cheatam, as such trustee, through his attorney in fact, leased the lot to the firm of Brotherton and Dryden for a period of fifteen years, the lessees agreeing to pay the taxes on the property for the use of the same. This firm occupied the lot for a lumber yard, and paid the taxes thereon until 1864. The same business was continued by the following firms which succeeded each other in the following order: Dryden, Overstoll, & Co.; Dryden, Wagner, & Co.; A. Boeckler & Co. The last firm was succeeded by the defendant Schulenburg and Boeckler Lumber Company, a corporation organized on the 12th of February, 1880. These several firms occupied the property for the same business, and paid the taxes regularly down to the year 1879. The defendant corporation continued to use the lot for like purposes. Mr. Boeckler, the president of the defendant, and a member of the firm of A. Boeckler & Co., testified that that firm occupied the lot in 1879; that the failure to pay the taxes for that year was due to some oversight; that the defendant paid taxes on the lot after 1879; that the prior firms had paid the taxes, and that the defendant "just went into their shoes."

In 1881 the collector brought suit against the unknown heirs of Mary O. Smith to enforce the payment of the taxes for 1879. The defendants in that case being all non-residents, were notified by publication, and a judgment was rendered by default for \$63.40. The property was sold in 1882 to one Mary Wing for \$518, under an execution issued on the special-tax judgment.

1. Conceding for the present that the defendant is liable, and liable to these plaintiffs as their tenant for a failure to pay the taxes for 1879, the question then arises, What is the measure of damages? The plaintiffs contend that they should have been awarded the full value of the lot, while the trial court held that they could not, in any event, recover more than the amount of the unpaid taxes and interest, and hence that court did not pass upon the question of the validity of the tax judgment and sale thereunder. The averment of the petition is, and the evidence tends to show no more, that the defendant agreed to pay the taxes in lieu of rent. Such,

then, is the covenant for a breach of which damages to the full value of the lot are demanded.

Mr. Sedgwick, after alluding to *Hadley v. Baxendale*, 9 Ex. 341, 18 Jur. 358, and subsequent American and English cases, reaches this conclusion: "That the plaintiff recovers such damages as are proximate and natural, and that in ascertaining what are natural consequences we must take into account all the circumstances of the case, including all facts bearing on the question which were in the knowledge of both parties, even though these be such as would not necessarily, without such knowledge, enter into it": 1 Sedgwick on Damages, 8th ed., sec. 149. From this statement of the general rule as to the measure of damages in case of a breach of contract, it is evident we must look to its application in particular cases for a definite guide.

In *Rector etc. v. Higgins*, 48 N. Y. 532, the tenant covenanted to pay and discharge all taxes and assessments. Having failed to pay assessments made by the city authorities to a large amount, the lessor brought suit and was allowed to recover the full amount of the assessments, though he had not paid any part of them. The covenant, it was held, was not one simply of indemnity, but a positive agreement to pay the assessments, and was broken when the defendant neglected to pay the taxes. "Upon the lessees' neglect to pay, a cause of action at once accrues to the lessor, and he may either pay the tax and sue the lessee for the amount, or may sue without first so paying it himself": Taylor on Landlord and Tenant, 8th ed., sec. 399. Indeed, it may be stated as a general rule that, when the defendant contracts to pay a debt and fails to do so, the measure of damages is the amount of the debt; but when the contract is one of indemnity only, damages must be sustained before a recovery can be had: *Rector etc. v. Higgins*, 48 N. Y. 532; *Ham v. Hill*, 29 Mo. 275; *Rowsey v. Lynch*, 61 Mo. 560.

The defendant's agreement was not one to protect and save plaintiffs harmless from all the consequences that might flow from the non-payment of the taxes. That is not its scope, object, or purpose. It was an agreement to pay the taxes when due. The amount to be paid was fixed as soon as the taxes were levied, and the agreement was broken as soon as they became due and were not paid. The plaintiffs, as we have seen, could have then maintained a suit for the amount of the taxes, without first paying them; for that amount be-

came a debt, and the damages are the same as allowed in other cases of non-payment of debts, namely, interest.

The plaintiffs were non-residents, it is true, and it does not appear that they had any actual notice that these taxes had not been paid; but they were bound to know that taxes would be levied annually on their property, and that the property would be bound for the payment of them. They failed to give the matter any attention; and the defendant and the firm of A. Boeckler & Co. failed to pay them by an oversight, due it would seem to a change of clerks. We think it follows from what has been said as to the legal effect of the agreement, that the plaintiffs had no right to rely upon the contract as one of indemnity in case of a sale of the property.

We are cited to *State v. Finn*, 87 Mo. 312, as leading to a different result. That was a suit against the sheriff for a false return, and is wholly inapplicable to the case in hand. *Blood v. Wilkins*, 43 Iowa, 565, is more in point. It was held in that case that where money is furnished to an agent to pay taxes and the agent fails to pay them, by reason of which the land is lost, that the measure of damages may be the money furnished, with interest, or the value of the land, according to circumstances; that if the land-owner is informed of his agent's failure to pay the taxes, his damages will be the money furnished with interest, but if he has no such knowledge, and the land is lost solely through the fault of the agent, then the agent will be liable for the value of the land. The duties of an agent intrusted with money to pay taxes are different from the duties of a tenant who agrees simply to pay taxes in lieu of rents. In the former case the land-owner has a right to rely upon his agent to pay them, for it is for that particular purpose that the agent is appointed; whilst in the latter case the land-owner must see to it that the taxes are paid.

The court, we conclude, gave correct instructions as to the measure of damages. The question whether the tax judgment and sale thereunder divested the plaintiffs of their title is, therefore, immaterial in this case, and the court did not err in failing to rule upon that question.

2. The defendant, by its appeal, contends that it is not liable to the plaintiffs in any amount, and the question under this claim arises on the refusal of the court to give instructions to the following effect:—

“1. Under the pleadings and the evidence the plaintiffs cannot recover.

"2. The defendant cannot be held liable for any tax assessed prior to the time it became incorporated and occupied the lot.

"3. If the plaintiffs acquired title by the deeds dated in 1883 and 1884, read in evidence, then they cannot recover.

"4. If Mary O. Smith conveyed the lot to C. Cheatam by her deed of December 10, 1842, the title so vested in him was not affected by the tax sale."

We have already said it was not necessary for the trial court, for any of the purposes of this action, to pass upon the validity of the tax sale, and hence this fourth instruction was properly refused.

The third instruction has no evidence to support it. The plaintiffs do not claim alone under these deeds. For a part of their title they claim by descent from the heirs of Mary O. Smith. It is for an undivided interest only that they claim under the deeds. Besides this, the deed dated the 1st of July, 1884, professes to be in correction of a prior deed from the same grantors to the same grantees, dated the 4th of March, 1878; and the deed of the 9th of October, 1883, was made to correct the acknowledgment of a deed between the same parties dated April 17, 1879; and the other one dated the 23d of April, 1883, was made to correct a deed dated 26th of April, 1879. For all the purposes of this case these deeds made in 1883 and 1884 relate back to the dates of the deeds which they were designed to correct, and the plaintiffs are to be regarded as acquiring the title at the dates of the original deeds. They therefore appear to have been the owners when the taxes accrued. At least nothing to the contrary is shown by the record, or pointed out by counsel.

As to the second refused instruction, the evidence shows that A. Boeckler & Co. occupied the lot during and prior to 1879, and became bound to pay the taxes for that year. The members of that firm and other persons formed the defendant corporation in February, 1880, which was after the taxes for 1879 became due. But this is not all. Boeckler, the president of the defendant, shows that the several firms succeeded each other in the business and occupancy of the lot, and that there was some change in the membership of each firm, and he then says we just stepped into their shoes. From this statement and the general tenor of the evidence it may be fairly inferred that the defendant assumed the unpaid debts of the firm, certainly such as the payment of these taxes. It may be true

that in the absence of this evidence the defendant would not be liable for these taxes, but in view of this evidence the instruction was properly refused. It is really no more than a demurrer to the evidence.

It is again insisted that the first refused instruction should have been given, because the plaintiffs failed to show any title whatever by deeds or otherwise.

The evidence certainly tends to show that the defendant and the prior firms occupied the lot under a written lease from Cheatam. Though the lease had been lost, and was not produced on the trial, still the evidence of the attorney in fact who signed it is clear that it was made in the name of Cheatam as trustee. The defendant cannot and does not dispute the title of Cheatam as trustee, and it is enough for the plaintiffs to show that they hold the title conveyed to him. For all the purposes of this case it was not necessary for them to go back and show title in Mary O. Smith.

The question, therefore, is whether this deed to Cheatam in trust conveyed away the whole title of Mary O. Smith, or whether it is simply an instrument in the nature of a mortgage. It is clearly nothing more than a conveyance to Cheatam in trust to protect and save harmless the sureties on the bond given by Mary O. Smith, binding her at her death to pay over \$4,315 to the heirs of her deceased husband, N. P. Smith. The deed of trust is in substance and effect a mortgage. There has been no sale under it, nor has it ever been foreclosed. Indeed it does not appear that the sureties ever paid a farthing on account of the bond. Nor does it appear that the sureties ever had possession of the property. Even if the deed of trust is still a subsisting security, still the position of the plaintiffs is that of heirs of a mortgagor, and they are entitled to possession and the rents until the mortgagee enters for condition broken: *In re Life Ass'n of America*, 96 Mo. 632. The plaintiffs being entitled to the rents, it must follow that they have a right to recover the amount of these taxes which should have been paid in lieu of rents.

With the conclusions before stated, it is unnecessary to consider the other questions presented by the briefs. The judgment is affirmed. All concur.

LANDLORD AND TENANT. — COVENANT OF TENANT TO PAY ASSESSMENTS runs with the land, and may be enforced against his assignee: *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT: See notes to *Western U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 778-790; and *Stanton v. New York etc. R'y Co.*, 21 Am. St. Rep. 121. As the sale of the lot in the principal case was undeniably a result which followed naturally, not to say inevitably, from the non-payment of the taxes, the decision must, we suppose, be intended to rest upon the ground that although such a result was to be expected, it should not, for the purpose of determining the liabilities of the parties, be deemed to have been contemplated by them, since the lessee had a right to rely upon the performance of the duty here assumed to be imposed upon the landlord, to see at his peril that the taxes were paid. If this view is correct, it is presumably to be regarded as a modification of the usual rule as to the measure of damages, which is justified by the special circumstances of the case. Ordinarily, we should think, it would be held that damages which the party breaking the contract knows to be a certain consequence of the breach, unless the other party does something to obviate that consequence, are fairly within the contemplation of both of them. We doubt if any of the cases, from *Hadley v. Barendale*, 9 Ex. 341, downwards, lend any support to the doctrine that such damages are not the natural and probable consequence of the non-fulfillment of the promisor's agreement. On the contrary, it will, we think, be found that the liability of the promisor has always turned upon the fact that the special circumstances which rendered a breach of his contract more serious than its nature and terms would indicate were not communicated to him. The defense that the promisee, by some action on his part, might have prevented the resulting damages, is not open to the promisor, except to the limited extent that the promisee, when he learns that the contract has actually been broken, is bound to use reasonable diligence to keep down the damages. To charge him with any duty beyond this would virtually amount to the introduction of the doctrine of contributory negligence into the law of contracts. These considerations seem to point to the conclusion that the decision in the principal case cannot be supported as an application of the ordinary rules for determining the measure of damages for the breach of a contract, and that the essential point really is, whether the duty of the landlord to see at his peril that the taxes were paid, was so peremptory and clearly defined as to create an exception to these rules. Considering the importance of determining this point, it is to be regretted that the learned judge has not thought fit to furnish any arguments or authorities in support of his position that such a duty exists. The mere fact that the plaintiffs "were bound to know that taxes would be levied annually on their property, and that the property would be bound for the payment of them," does not seem to be an adequate foundation for the theory. It does not necessarily follow that because the landlord is bound to have this knowledge, he is, under all circumstances, bound to see that the taxes are paid. Such a deduction begs the very question at issue, viz., whether in a case where the tenants have an equal knowledge of the circumstances, and have also stipulated to pay the taxes are not chargeable with the duty here imputed to the landlord. We are still left to conjecture why the landlord has not as much right to rely upon the performance of a duty expressly undertaken by the tenant, as the tenant has to rely upon the performance of a supposed duty of the landlord. On the whole, therefore, without expressing the opinion that this decision may not possibly be sustained by reasons other than those advanced by the court, we think that the interesting and very important question here mooted still remains open to discussion.

MORTGAGE, WHAT CONSTITUTES A. — Wherever a conveyance or assignment of an estate is originally intended as a security for money, it is always considered in equity as a mortgage: *Wilcox v. Morris*, 1 Murph. 116; 3 Am. Dec. 678; *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889; *Bell v. Pelt*, 51 Ark. 433; 14 Am. St. Rep. 57. Thus a conveyance of certain chattels to a surety on a note "to have and to hold, etc., until he shall become relieved of all indebtedness," is a mortgage: *McKnight v. Gordon*, 13 Rich. Eq. 222; 94 Am. Dec. 164. So also is a deed executed by a judgment debtor to indemnify against loss one who has become liable as replevin bail: *Ashton v. Shepherd*, 120 Ind. 69; and a deed of trust executed for the purpose of securing a debt: *Cross v. Fombey*, 54 Ark. 179; *Thompson v. Marshall*, 21 Or. 171.

PRATT v. MILLER.

[109 MISSOURI, 78.]

STATUTE OF FRAUDS — CONTRACT FOR MANUFACTURED GOODS, WHEN WITHIN.

When a contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the same time a manufacturer, and a dealer in them as a merchant, or so dealing has them manufactured for his trade by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware, the quantity required, and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care, or personal skill, or the use of material, or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not in existence at the time the contract is made, but are to be thereafter made and delivered.

STATUTES OF ANOTHER STATE, ADOPTION OF — PRIOR JUDICIAL CONSTRUCTION. — In adopting the statute of another state, or of a foreign country, it is to be presumed that the legislature adopts it as construed by the courts of the state or country from which it is taken; but the force of this presumption must always depend upon the extent to which the terms of the statute have acquired a known and settled meaning, and a definite application at the time of its adoption in the courts of the jurisdiction from which it is taken, and while such construction has more weight than a construction of the same statute by the courts of the country from which it is adopted subsequent to its adoption elsewhere, yet it can never amount to more than persuasive authority as to the true intent and meaning of the statute, and the proper application of its terms; or be permitted to prevail against the general policy of the laws and the practice of the country of its adoption.

S. P. Sparks, for the appellants.

S. T. Allen, for the respondents.

BRACE, J. This is an appeal from the Johnson circuit court to the Kansas City court of appeals, certified here from the latter court on the ground that the conclusion reached by that court is in conflict with the decision of the St. Louis court of appeals in *Burrell v. Highleyman*, 33 Mo. App. 183.

Plaintiffs' cause of action set out in the petition is: That the defendants ordered and requested plaintiffs to manufacture for and furnish to them divers goods, wares, and merchandise, being boots and shoes, of which an itemized account, the price amounting to \$265.45, is filed; that plaintiffs accepted said order, manufactured said goods, shipped and tendered them to defendants, who refused to pay for them. The defendants' answer was a denial of the material allegations of the petition, a plea of the statute of frauds, a warranty of quality, and breach thereof.

The evidence tended to show that the plaintiffs are wholesale dealers in boots and shoes in the city of Boston, Massachusetts, and that they are either themselves manufacturers or have manufactured for them their stock in trade; that the defendants were retail merchants in Holden, Missouri; that on the 31st of May, 1877, the defendants at Holden gave the commercial traveler and solicitor of plaintiffs a verbal order for the bill of goods sued for; that the solicitor made a memorandum of the order in writing, signed it himself, gave a copy to the defendants and forwarded it to the plaintiffs, who thereafter proceeded to have the goods made; that on the eighth day of July the defendants wrote the plaintiffs countermanding the order, and again on the 28th to the same purport; on the 29th of July plaintiffs replied to defendants' letter of the 8th, refusing to accept the countermand, and advising the defendants that the goods would be shipped at the time named in the order; and on the 13th of August they shipped the goods addressed to the defendants at Holden, Missouri, where they arrived, and defendants refused to receive or pay for them.

There was no evidence tending to show that the goods were not of the quality contracted for; and the defendants refused to receive the goods, not on account of defect in quantity or quality, but for the reasons assigned in their letters which was a dissolution of their partnership in the first letter, and the excessive drought prevailing in the country curtailing trade, in their second.

The court refused an instruction asked for by the defend-

ants in the nature of a demurrer to the evidence, and submitted the case to the jury on the following instruction for the plaintiffs:—

“The court instructs the jury that if they believe from the evidence that the defendants ordered plaintiffs to make and furnish to them the goods set out in the petition, and that plaintiffs did commence to manufacture said goods on or about the time the order was received, and had a large portion of said goods manufactured on the eighth day of July, 1887, when defendants countermanded said order, and that plaintiffs did manufacture said goods and deliver them to a common carrier, directed to defendants at their place of business, then the plaintiffs must recover for the price sued for.”

The jury found the issues for the plaintiffs, and from the judgment of the circuit court thereon, for the price of the goods and interest, the defendants appealed to the Kansas City court of appeals, where the judgment of the circuit court was affirmed, but the case certified here for the reason stated.

1. Section 2514, Revised Statutes, 1879, provides that “no contract for the sale of goods, wares, and merchandise for the price of thirty dollars or upwards shall be allowed to be good unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized.” This statute was first enacted in this state in 1825 (Laws, 1825, p. 214), and, except as to the amount, is almost a literal transcript of the English statute, 29 Car. II., c. 3, sec. 17.

The question to be determined in this case is, whether the contract in question is a contract for the sale of goods, wares, and merchandise, or a contract for work and labor to be done and materials to be furnished. If the former, it is within the statute, and the plaintiffs cannot recover. If the latter, it is not within the statute, and they may. The Kansas City court of appeals, in effect, held that the contract belonged to the latter class, and was not within the statute, without discussing the question, but simply citing *Browne on the Statute of Frauds*, section 308a, in support of its conclusion.

The whole question as to when a contract is to be held to belong to one or the other of these classes was maturely considered and ably discussed in *Burrell v. Higleyman*, 33 Mo.

App. 183, by the St. Louis court of appeals. The majority of the court, in an opinion delivered by Rombauer, P. J., holding, in consonance with the ruling in *Lee v. Griffin*, 1 Best & S. 272, that "when the subject-matter of a contract is a chattel to be afterwards delivered, then, although work and labor are to be done on such chattel before delivery, the cause of action is goods sold and delivered, and the contract is within the statute of frauds." Thompson, J., in a dissenting opinion, after reviewing the English cases from the passage of the act in England until the date of its adoption in this state, adhered to the construction placed upon the statute by the English courts prior to the latter date, and by the supreme court of New York in *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187, decided in 1820, i. e., "that a contract to deliver at a future day a thing not then existing and yet to be made is not within the statute." Or as stated in the *syllabus*, "Where work, labor, or materials were to be applied to the chattel in order to put it in condition for delivery to the purchaser, such a contract is not within the statute."

Mr. Benjamin, in his excellent treatise on sales, in entering on a review of the English cases, says: "There have been numerous decisions, and much diversity and even conflict of opinion in relation to the proper principle by which to test whether certain contracts are 'contracts for the sale,' etc., under the seventeenth section, or contracts for work and labor done and materials furnished": 1 Benjamin on Sales, 3d ed., sec. 103-117; and concludes by saying: "In reviewing these decisions it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in *Lee v. Griffin*, 1 Best & S., 272, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough, in 1814, and closing with Pollock, C. B., in 1856. From the very definition of a sale, the rule would seem to be at once deducible that, if the contract is intended to result in transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley, J., in *Atkinson v. Bell*, 8 Barn. & Cr. 277, and Tindall, C. J., in *Grafton v. Armitage*, 2 Com. B. 336; but it was not clearly and distinctly brought into view before the decision in *Lee v.*

Griffin, 1 Best & S. 272. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result." The result of that process in America, briefly stated in a general way, may be found in the eighth Am. & Eng. Ency. of Law, page 707, et seq.

In New York the rule is that if the subject-matter of the transfer does not exist *in solido* at the time of making, the contract is for work and labor, but if it does then exist the contract is none the less a contract of sale, that work and labor of the vendor is to be expended upon it before its delivery. This rule is founded upon the decision in *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187, afterwards followed in *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619; and other cases based on old English decisions, such as *Towers v. Osborne*, 1 Strange, 500, and *Clayton v. Andrews*, 4 Burr. 2101.

In *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, decided in 1875, Dwight, C., remarks: "Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*, 1 Best & S. 272. It is at once so philosophical, and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected even at the expense of sound principle."

In Maryland in *Eichelberger v. McCauley*, 5 Har. & J. 213, 9 Am. Dec. 514, decided in 1821, the rule of the earlier English decisions was maintained, Earle, J., in delivering the opinion of the court, saying: "Whatever opinion may be entertained of the true meaning of the seventeenth section of the statute, the court thinks the distinction between mere contracts of sale of goods, and those contracts for the sale of goods where work and labor is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in the contemplation of the statute, has too long prevailed to be at this day questioned," citing the English cases of *Clayton v. Andrews*, 4 Burr. 2101, decided in 1767, and *Rondeau v. Wyatt*, 2 H. Black. 63, in 1792, in support of the conclusion. In the later case of *Rentch v. Long*, 27 Md. 188, the ruling in *Eichelberger v. McCauley*, 5 Har. & J., was affirmed,

Bartol, J., speaking for the court, saying: "Whatever opinion we might entertain on this question if it were presented for our consideration for the first time, we are not willing to disturb the rule established by" that case.

It will be observed that the rule of construction established in these states is not maintained in the later case upon the ground of sound principle, nor yet upon the ground that the courts were concluded by the early English rulings made before the statute was enacted in those states, but upon the ground that those rulings having received a particular construction by their own courts in their early rulings they felt constrained to maintain them to the extent stated, on the principle of *stare decisis*.

In most of the other states where the courts were not thus fettered, while the rulings cannot be said to go the length of that in *Lee v. Griffin*, 1 Best. & S. 272, which is now the settled rule in England, they trend in that direction; as illustrative of this fact the following cases may be cited: *Spencer v. Cone*, 1 Met. 283; *Gardner v. Joy*, 9 Met. 177; *Lamb v. Crafts*, 12 Met. 353; *Goddard v. Binney*, 115 Mass. 450; 15 Am. Dec. 112; *Pitkin v. Noyes*, 48 N. H. 294; 2 Am. Rep. 218; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55; *Atwater v. Hough*, 29 Conn. 508; 79 Am. Dec. 229; *Finney v. Appgar*, 31 N. J. L. 266; *Cason v. Cheely*, 6 Ga. 554; *Edwards v. Grand Trunk R'y Co.*, 48 Me. 379; *Sawyer v. Ware*, 36 Ala. 675; *Meinke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722; *Brown v. Sanborn*, 21 Minn. 402. In many of these cases rules are laid down for distinguishing a contract of sale from one for work and labor and materials, not always harmonious or entirely consistent with each other, but from which a general rule may be drawn, broadly stated as well in Browne on the Statute of Frauds as elsewhere, "that if the contract is essentially a contract for the article, manufactured or to be manufactured, the statute applies to it; but if it is for the manufacture, for the work, labor, and skill to be bestowed in producing the article, the statute does not apply. . . . The true question is, whether the essential consideration of the purchase is the work and labor of the seller to be applied upon his materials, or the product itself as an article of trade": secs. 308, 308a.

And within the general scope of the American authorities this rule may be formulated determinative of the case in hand. That, where the contract is for articles coming under the general denomination of goods, wares and merchandise, the ven-

dor being at the same time a manufacturer, and a dealer in them, as a merchant, or, so dealing, has them manufactured for his trade by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required, and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care, or personal skill or the use of material, or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered.

This rule predicated upon the undisputed facts of this case is within the ruling in *Burrell v. Highleyman*, 33 Mo. App. 183, by the St. Louis court of appeals, and in conflict with the conclusion reached by the Kansas City court of appeals; and, while sufficient for the disposition of this case, it is proper to add generally, this being the first time this court has been called upon to pass upon this question directly, that while we adhere to the rulings heretofore made in *Skouten v. Wood*, 57 Mo. 380, *Skrainka v. Allen*, 76 Mo. 384, and *Snyder v. Wabash etc. R'y Co.*, 86 Mo. 613, that in adopting the statute of another state, or of a foreign country, it is to be presumed that the legislature adopted such statute as construed by the courts of the state or country from which such statute is taken. Yet it is to be remembered that the force of this presumption must always depend upon the extent to which the terms of the statute have acquired a known and settled meaning and a definite application at the time of its adoption in the courts of the jurisdiction from which the statute is taken; and, while such construction has more weight than a construction of the same statute by the courts of the same country subsequent to its adoption in this state, yet it can never amount to more than persuasive authority as to the true intent and meaning of the statute, and the proper application of its terms; or be permitted to prevail against a plain and obvious interpretation of the statute or countervail the general policy of our laws and practice: Endlich on Interpretation of Statutes, sec. 371. "The uniform inclination of the courts of this state" is "to give the words of this statute

full effect and to refuse to sanction such a latitudinous construction of those words as would give rise to all the evils that the statute was enacted to prevent": *Delventhal v. Jones*, 53 Mo. 460.

The construction by the English courts of this statute prior to 1825 was not so well known, definite and settled, nor its application so uniform, that we ought to be concluded by the decisions of those courts prior to that date, from adopting a rule brought to light by further judicial research, and which gives true force and effect to the terms of this statute, as does the rule laid down in *Lee v. Griffin*, 1 Best & S. 272, and approved by the St. Louis court of appeals in *Burrell v. Highleyman*, 33 Mo. App. 183. The undisputed facts in this case show that this contract was a sale of goods, wares, and merchandise within the meaning of the statute, and not being in writing the demurrer to the evidence ought to have been sustained.

The judgment of the Kansas City court of appeals will, therefore, be reversed and the cause remanded to that court where judgment will be entered reversing the judgment of the Johnson circuit court. —

SALES — REQUIREMENTS OF THE STATUTE OF FRAUDS: See, generally, notes to *Crookshank v. Burrell*, 9 Am. Dec. 188-190, and to *Pawelski v. Hargreaves*, 54 Am. Rep. 164-170. Besides the cases from this series cited in the opinion of the principal case, reference may be made to *Warren etc. Mfg. Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788, reiterating the doctrine of *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517; *Fickett v. Swift*, 41 Me. 65; 66 Am. Dec. 214; where it was said that a contract which is for the delivery, and not the manufacture and delivery of certain articles, is within the statute of frauds; and *Idle v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698, where the court left undecided the point whether the statute was applicable to a case in which the goods were to be delivered in the future, to be manufactured by the seller, or some important alterations were to be effected by him before delivery.

STATUTES OF FOREIGN STATES, ADOPTION OF. — A statute adopted from a sister state or from England, which has received a settled and uniform construction by the courts of the country from which it has been taken, must be given a similar construction by the country adopting it: *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *Woolsey v. Cade*, 54 Ala. 378; 25 Am. Rep. 711; *Myrick v. Hasey*, 27 Me. 9; 46 Am. Dec. 583; *Ballance v. Rankin*, 12 Ill. 420; 54 Am. Dec. 412; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *Watson v. Lane*, 52 N. J. L. 550; *Barmore v. State Board of Medical Examiners*, 21 Or. 301. In *Nicoll et Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, the rule was qualified to the extent of holding that the intention of legislature to adopt the construction of the statute with the statute itself was a presumption to be considered in connection with other principles of construction; and

in *Spokane etc. Lumber Co. v. McChesney*, 1 Wash. 609, it was declared that in such cases the decisions of another state construing a statute contrary to its plain import should not be followed, especially where such statute has been previously adopted in other states, and there construed according to its terms, before its enactment in the state where it was to receive a construction.

STATE v. TATE.

[109 MISSOURI, 265.]

PRACTICE. — **MOTION TO SET ASIDE JUDGMENT** for irregularity will, under the Missouri statute, be entertained if made in the same court within three years from the rendition of the judgment.

JUDGMENTS — ENTIRETY OF. — A judgment against several obligors on a bond, one of whom was dead when suit was brought, is irregular, but such irregularity is not sufficient ground upon which to vacate a judgment regularly rendered as to the other defendants therein.

JUDGMENTS — ENTIRETY OF. — The liability of defendants in a judgment for the payment of money, originating in a joint and several contract, is several in nature, and an irregularity in its rendition, as against one defendant, furnishes no sufficient reason to vacate the judgment regularly rendered as to the other parties defendant therein.

PRACTICE. — **MOTION TO VACATE JUDGMENT** on the ground that the petition upon which it is based does not state facts sufficient to constitute a cause of action cannot be interposed, after the lapse of the term at which the judgment was rendered.

JUDGMENT — AMENDMENT OF. — The court may, in affirming a judgment, strike therefrom the name of a party against whom it was irregularly rendered because of his death prior to the commencement of the action.

Monks and Williams, for the appellant.

Evans and Love, for the respondents.

BARCLAY, J. The relator, for whose use and benefit this action runs, is Ozark County. The cause is based upon the official bond of an ex-collector, and alleged breaches thereof.

Touching such proceedings it is declared by section 882, Revised Statutes, 1889, that "every suit brought upon such official bond, to the use of the party aggrieved, and every judgment thereon, shall be deemed the private suit and judgment of the relator, in the same manner, in every respect, as if he were the nominal plaintiff, and such relator shall be liable for costs as other plaintiffs": Same as sec. 583 of 1879.

The county is the real party in interest as plaintiff, and that fact brings the present appeal within the revisory jurisdiction of this court: Const. 1875, art. 6, sec. 12.

2. The matter presented for review concerns the correctness of the rulings on the circuit upon two motions, filed some years

after the first judgment. These motions were, by consent, heard together, and the following facts developed:—

In 1887 plaintiff recovered judgment against defendant Tate, the ex-collector, and the other defendants as sureties upon his official bond. This judgment was reached in due course upon pleadings in ordinary form, and findings by a referee to whom the issues were sent for trial by agreement of the parties.

No motion for new trial was made by defendants, and the term of the judgment lapsed without any steps toward reviewing it.

At the April term, 1889, one of the motions now under consideration was filed by defendants, by which they seek to set aside the judgment mentioned, for the reasons: 1. That one of the defendants, J. J. Piland, named therein, was dead at the time the action was instituted; and 2. That the plaintiff's petition therein is insufficient.

Thereupon the plaintiff, next day, made a motion to amend the judgment record, by striking out the name of J. J. Piland, for that he had never been served with process in the cause, being dead, and that the entry of his name was a misprision of the clerk.

It further appeared at the hearing of these motions, that, in the sheriff's return to the summons, no mention is made of service on J. J. Piland, but he is therein stated to be "not living." Plaintiff concedes that he was dead during the proceedings, as claimed by defendants.

On this showing of facts the trial court denied plaintiff's motion to amend the judgment, and sustained the defendant's motion to vacate it entirely.

The plaintiff excepted to these rulings, and after unsuccessful motions to correct them and preserving its points for review in due form, appealed to the St. Louis court of appeals. That court transferred the cause to the supreme court, for the reason already noted.

We will first review defendant's motion to set aside the judgment. It is evidently predicated on the section which sanctions motions to set aside judgments for irregularity, if "made within three years after the term at which such judgment was rendered": Rev. Stats. 1889, sec. 2235; same as Rev. Stats. 1879, sec. 3727.

The motion was not brought on by legal representatives of the deceased, in the interest of his estate, but by his co-

defendants, evidently on the theory that the judgment is an entirety, and being irregular as to the dead, must be vacated as to the living defendants named in it.

The action is an ordinary one to enforce the obligation of a contract, joint and several, under our statutes: Rev. Stats. 1889, secs. 2384-2387. Plaintiff saw fit to bring all the defendants into one action, as it plainly had the right to do (Rev. Stats. 1889, sec. 1995), and obtained judgment accordingly, which might lawfully be enforced in full against any one of the defendants alone, leaving him to assert his equity to contribution against his co-obligees.

The judgment was irregular, to say the least, as against J. J. Piland, the deceased. He was not served with process, and was reported "not living" by the sheriff, though the effect of that part of the return we do not now discuss; but was the judgment on this account irregular as against the other defendants properly before the court? We think not.

If there is any useful vitality in the code provisions touching this subject, such irregularity furnishes no good reason to annul the judgment against the live defendants. Was it more than a mere defect in form as to them? Rev. Stats. 1889, secs. 2101, 2117. Did it effect their substantial rights upon the merits? Rev. Stats. 1889, sec. 2100. Surely not. The only basis for contending that it did rests on the supposed entirety of every judgment at law. There are numerous remarks scattered through our reported cases to the effect that such a judgment is an entirety, and must stand or fall compactly as to all parties defendant to it; and some decisions rest squarely upon that proposition: *Smith's Adm'r v. Rollins*, 25 Mo. 408; *Hoskinson v. Adkins*, 77 Mo. 537; *Covenant etc. Ins. Co. v. Clover*, 36 Mo. 392; *Pomeroy v. Betts*, 31 Mo. 419; but there are also many final rulings inconsistent with that theory so broadly stated.

It has been frequently held that in a collateral proceeding the fact that such a judgment is void as to one defendant does not, of itself, necessarily vitiate it as to others: *Lenox v. Clarke*, 52 Mo. 115; *Wernecke v. Wood*, 58 Mo. 352; *Holton v. Turner*, 81 Mo. 360; *Williams v. Hudson*, 93 Mo. 524; and in many cases where judgments at law have been questioned on appeal or error, the results announced are not in harmony with the theory of entirety. Thus in *Crispen v. Hannovan*, 86 Mo. 160, though it is stated in a general way that a judgment is an entirety, the conclusion reached by this court striking

out the name of a party erroneously joined as defendant in the circuit court's judgment, and then affirming the latter, shows a practical abandonment of the theory. The same action had been taken by this court previously in *Cruchon v. Brown*, 57 Mo. 38, and *Weil v. Simmons*, 66 Mo. 617, both cases at law.

In the very recent case of *Kleiber v. People's Ry Co.*, 107 Mo. 240, an action for damages for personal injuries, wherein there was a judgment against both defendants on the circuit, this court *in banc*, on appeal, affirmed the judgment as to one defendant, and reversed it as to the other.

A similar practice has been followed in other instances: *Westcott v. Bridwell*, 40 Mo. 146; *Hunt v. Missouri R. R. Co.*, 89 Mo. 607; *La Riviere v. La Riviere*, 97 Mo. 80; *Rude v. Mitchell*, 97 Mo. 365.

We apprehend that the more recent rulings on this point give better expression to the principles that animate our code of procedure. We believe the latter intended to assimilate the treatment of judgments at law (when practicable), in the particular under consideration, to that which has always been conceded to apply to decrees in equity upon appeal: *Dickerson v. Chrisman*, 28 Mo. 141.

There may possibly be judgments which, owing to the peculiar nature of the proceedings wherein they occur, require to be treated as entireties. We are not now called upon to decide as to that, and it is better to avoid generalizing unnecessarily.

Keeping in view the case before us, we hold that the liability of defendants in a judgment for the payment of money, originating in a joint and several contract, is several in nature, and that an irregularity in its rendition, as against one defendant, furnishes no sufficient reason to vacate the judgment, regularly rendered as to the other parties defendant therein.

3. Another ground of defendant's motion to vacate is that the petition in the case does not state facts sufficient, etc. If that point is well taken, it would indicate judicial error in the judgment, but it would not justify setting it aside as irregular upon such a motion as this. An erroneous judgment, regularly reached in accordance with established rules of procedure, cannot be reversed by such a motion interposed after the lapse of the term at which it was pronounced: *Peake v. Redd*, 14 Mo. 79; *Bank of U. S. v. Moss*, 6 How. 31.

We conclude that all the reasons assigned in defendant's

motion are insufficient, and that it should have been overruled.

4. The plaintiff's motion to amend the judgment by striking out the name of J. J. Piland therein, is next to be considered.

Because of the facts already mentioned, the court should not have included J. J. Piland among the defendants in the original judgment. The latter was merely null as to him, though good as to the other defendants; and while the irregularity might have been simply ignored, it was, nevertheless, competent for anyone interested, having a stand in the litigation, to invoke the court's aid to correct it, by striking out the name from the judgment. In contemplation of law, it was as if never entered there, and to strike it out was to do nothing more than shape the form of the record to conform to the legal truth.

Under our statute of amendments, this might properly be done (in affirmance of the true judgment), by the trial court or by any appellate court which the cause might reach in due course: Rev. Stats. 1889, sec. 2101, same as Rev. Stats. 1879, sec. 3570. The authority conferred by the section cited has often been exercised by this court, and is an important feature of the present code of civil procedure. Its utility and justice have been recognized in prior decisions, and need not be enlarged upon at this time: *Weil v. Simmons*, reviewed in 8 Cent. L. J. 340; *Crispen v. Hannovan*, 86 Mo. 160.

The plaintiff's motion to amend should have been sustained.

The final orders of the trial court, relating to both the motions, are reversed with directions to overrule defendant's motion to vacate the judgment, and to sustain plaintiff's motion to amend it, as indicated. All the judges of this division concur.

JUDGMENTS, ENTIRETY OF. — As to whether a judgment void as to one defendant is void as to all: See note to *St. John v. Holmes*, 32 Am. Dec. 604-607; *Hulme v. Jones*, 6 Tex. 242; 55 Am. Dec. 774; *Buffum v. Ramsdell*, 55 Me. 232; 92 Am. Dec. 589; *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456; *Herraisson v. McArthur*, 87 Ga. 478; *Newburg v. Munshower*, 29 Ohio St. 617; 23 Am. Rep. 769; *Winchester v. Beardin*, 10 Humph. 247; 51 Am. Dec. 702.

JUDGMENTS. — A MOTION TO VACATE A JUDGMENT for mere irregularities or errors in law will not be granted at a subsequent term: *Alabama etc. R'y Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541.

WARREN v. CASTELLO.

[109 MISSOURI, 338.]

MARRIED WOMEN — SEPARATE ESTATE. — A deed to a trustee of a married woman and her heirs and assigns does not create a separate estate in her.

SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY. — A contract by which an owner for a valuable consideration binds himself to convey his land to another upon condition that such other shall, within a specified time, accept his offer and comply with the terms proposed, may be specifically enforced.

SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY TO MARRIED WOMEN — WANT OF CONSIDERATION. — A contract by which an owner voluntarily and without any consideration attempts to bind himself to make a deed of a tract of land within a certain time to a married woman, who expressly stipulates not to be bound by the contract, will not be specifically enforced, because of want of consideration and of mutuality both of obligation and of remedy.

Rassieur and Schnurmacher and G. W. Royse, for the appellant.

J. A. Henderson, for the respondents.

GANTT, P. J. This proceeding was commenced in the probate court of St. Louis County, seeking the specific performance of an agreement alleged to have been made February 1, 1884, between plaintiff, Mary J. Warren, then and now a married woman, and William Mreen, since deceased, whereby it is claimed that the said Mreen agreed at any time before March 1, 1889, to convey to said Mary J. Warren certain land lying in St. Louis County, upon the payment to him of two thousand dollars.

The proceeding was originally commenced against Mary Ann Mreen, the widow and executrix of the deceased; since the appeal to this court, Charles Costello, her successor as administrator of the estate, has been substituted for her in the action.

The contract, which is made the basis of this proceeding, is in the form of a bond, in which the said Mreen binds himself to plaintiff, Mary J. Warren, in the penal sum of two thousand dollars, to be void if he should make and deliver to her a good and sufficient warranty deed for said parcel of land. The contract is signed only by said Mreen, and contains the following provision: —

“And it is further expressly understood and agreed that the said Mary Warren is in no way obligated to purchase said lands, but that the true intent and meaning of this instru-

ment is, that the said Mary Warren, who is now occupying said lands under a written lease for a term of fifteen years, ending March 1, 1889, shall hereby and herein have the privilege of purchasing said lands at any time during the continuance of said term by paying to said William Mreen the said sum of two thousand dollars, and that upon payment of said sum of money within the time specified, the said Mreen shall cause to be made, executed, and delivered to her a good and sufficient warranty deed therefor."

The evidence disclosed that Mrs. Warren never paid or offered to pay any part of the purchase price to Mreen in his lifetime; that when Mreen signed the agreement, she was already in possession of the land therein described under a lease theretofore entered into between her husband (who was also her trustee) and Mreen, dated June 14, 1883; that Mrs. Warren was in the quarry business; that she had worked a quarry on the land, and had also set out some fruit trees and grapevines on a part of it. Against the objections of defendant that she was an incompetent witness, the plaintiff, Mary J. Warren, was permitted to testify in her own behalf in the circuit court; that before commencing this proceeding she had tendered Mrs. Mreen, who was then acting as executrix of deceased, the sum of two thousand dollars, and had demanded of her a conveyance to the land. To this action of the court, in permitting Mrs. Warren to testify, an exception was duly saved by defendant.

In the probate court, and again in the circuit court, there was a finding and judgment for the plaintiff, and the case has been brought here on an appeal taken by the representative of the estate.

On behalf of the defendant it is submitted that the court below erred in its judgment, and that no specific performance of the contract should have been ordered; because, —

1. The agreement is without consideration to support it;
2. The agreement lacks mutuality of obligation and of remedy in this: That Mrs. Warren having been at the time the contract was made (and ever since) a married woman, the same was not binding upon her, nor enforceable against her;
3. The contract lacks mutuality by its own terms, independent of any personal incapacity of Mrs. Warren;
4. There was also error in permitting Mrs. Warren to testify as a witness in her own behalf, inasmuch as the other party to the contract in issue and on trial was dead.

As Mreen signed the bond, the statute of frauds constitutes no objection to the validity of the contract. His estate was sought to be charged. The objection to this contract is much more substantial. The want of any consideration to support it and the incapacity of Mrs. Warren to make it are urged against it.

Here the record discloses that no part of the purchase-money has been paid or accepted. No consideration was paid Mreen for signing the agreement; it was purely voluntary; the agreement to sell was no part of the lease; it was subsequent to and independent of the lease; the possession of the land was by virtue of the lease only, and is referable to that and not to the agreement to sell: *Emmel v. Hayes*, 102 Mo. 186, 22 Am. St. Rep. 769; so that we have here the case of a land-owner of his free-will, without any consideration therefor, attempting to bind himself to make a deed to a tract of land to a married woman at any time during a term of fifteen years that she might pay him two thousand dollars.

There was an attempt to show by the evidence that Mrs. Warren was possessed of an estate in equity to her sole and separate use. The only evidence tending to show this was a deed "to John B. Warren, trustee of Mary Warren, and her heirs and assigns." These words were not sufficient to create a separate estate. They created a trust, but not such a separate estate as she could bind by her contracts as if she were sole: *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319. Now it is perfectly clear that Mreen could not have maintained specific performance against Mrs. Warren for two reasons: 1. He expressly agreed she was not bound by the writing; and 2. She was a *feme covert*.

The general rule requiring mutuality of contract and remedy in order to enforce specific performance is not denied or questioned by respondent's counsel: *Glass v. Rowe*, 103 Mo. 513; *Marble Co. v. Ripley*, 10 Wall. 339; but he insists that this case comes within the equally well-established exception to that rule, that where the contract or agreement is unilateral, and by its terms one party only is to be bound, specific performance will be enforced against that one.

The cases in which the decree was predicated upon the part performance of the contract are distinguishable from the question now to be decided. Those cases rest on a distinct equity, and we may remark that this court and the courts generally have held part payment of the purchase-money is not such a

part performance as will entitle the party to a decree for specific performance. That a land-owner may, for a valuable consideration, bind himself to convey his land to another upon condition that such other shall, within a specified time, accept his offer and comply with the terms proposed, is not open to question: *Mastin v. Grimes*, 88 Mo. 478; *Waterman on Specific Performance*, sec. 200; *Pomeroy on Specific Performance*, sec. 169.

Transactions in real estate to an almost unlimited extent are daily founded upon this well-recognized law. The principle on which this seeming exception is based is that the bond or conditional covenant to convey upon the option of the lessee or vendee is a continuing offer on the part of the vendor or owner, until accepted within the time and on the terms limited in the option and when accepted it becomes a valid agreement, supported by mutual promises of competent parties: *Willard v. Tayloe*, 8 Wall. 557; *Boston etc. R. R. Co. v. Bartlett*, 3 Cush. 224; *Welchman v. Spinks*, 5 L. T., N. S. 385; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394; *Waterman on Specific Performance*, sec. 200.

Mr. Bishop in his work on the Law of Married Women, second volume, section 250, discusses the point under consideration. He says: "But if the agreement rests merely in mutual promises then in principle, as the promise of the married woman is a nullity, it cannot constitute a consideration for the promise of the other party; therefore, it is void also as to him. This is the true ground on which proceeds a North Carolina case of mutual promises, followed by a tender on the part of the married woman, wherein it was held upon the facts that she could not have a decree of specific performance against the defendant who had agreed to convey some property to her separate use": *Lanier v. Ross*, 1 Dev. & B. Eq. 39, 40.

Mrs. Warren not only gave no consideration for Mreen's promise to convey to her, but she was careful to stipulate that she was in nowise bound to purchase the land. She not only was incapable of agreeing to purchase, but the bond carefully exonerates her from all liability. She now seeks, after the death of Mreen, to obtain a conveyance to property which she could never have been compelled to take had its value diminished.

There is neither mutuality of obligation or remedy; there was no consideration for the promise to convey; nothing was paid for the option. The agreement, therefore, was gratuitous

and voluntary and incapable of enforcement: *Tucker v. Bartle*, 85 Mo. 114; Story on Equity Jurisprudence, sec. 793b; *Neef v. Redmon*, 76 Mo. 195. The judgment of the circuit court is reversed, and the cause remanded with directions to enter a final judgment for defendant on the merits and for costs.

All of this division concur.

HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE.—For instances of words in a will which will make property conveyed to a married woman her separate estate, see *Smith v. Wells*, 7 Met. 240; 39 Am. Dec. 772. A marriage settlement executed by husband and wife, in trust, by the words, "to the use, benefit, and behoof of himself and wife" does not create a separate estate in the wife: *Sanderson v. Jones*, 6 Fla. 430; 63 Am. Dec. 217.

SPECIFIC PERFORMANCE of a unilateral contract to convey land, without any mutuality of remedy or consideration, will not be enforced in equity: *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; but such a contract will be enforced if there is a mutuality of remedy, an adequate consideration, and an unconditional acceptance within the time stipulated for the exercise of the option to accept: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; *Bradford v. Foster*, 87 Tenn. 4; *Weaver v. Burr*, 31 W. Va. 733; *Barrett v. McAllister*, 33 W. Va. 738. The statement of the consideration is sufficient if a way be clearly pointed out for determining the same, even though the precise character or amount thereof be left unexpressed: *Ross v. Purse*, 17 Col. 24. Though mutuality of remedy is requisite, it is not essential that there be mutuality *ab initio*, but it is enough if the mutual enforcement is practicable when performance is decreed: *Brown v. Munger*, 42 Minn. 482. A contract to grant a right of way over contiguous tracts of land of husband and wife, respectively, lacks mutuality, as it cannot be enforced against her: *Shenandoah Valley R. R. Co. v. Dunlop*, 86 Va. 346.

MILLER v. MISSOURI PACIFIC RAILWAY CO.

[109 MISSOURI, 350.]

MASTER AND SERVANT — VICE-PRINCIPAL, LIABILITY FOR NEGLIGENCE OF.—

When a master gives to his servant the power to superintend, control, and direct other servants engaged in the performance of a work, such servant is, no matter what he is called, as to the men under him, a vice-principal, and the master is liable for his negligent acts and omissions in performing his duties.

MASTER AND SERVANT — VICE-PRINCIPALS, WHO ARE, AND LIABILITY FOR NEGLIGENCE OF.—A conductor having charge of a construction train, and a foreman having charge of a crew of men engaged in constructing a railroad track, with power to direct their movements, are both vice-principals, and the railroad company is liable for their negligence resulting in the death or injury to any of such crew.

MASTER AND SERVANT — NEGLIGENCE OF VICE-PRINCIPAL — MEASURE OF DAMAGES.—When the representatives of a railroad employee are en-

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titled to recover for an injury resulting in death, occasioned by the negligence of a vice-principal of the company in running, conducting, or managing any locomotive or cars, the measure of damages, under the Missouri statute, is five thousand dollars.

H. S. Priest and H. G. Herbel, for the appellant.

S. P. Sparks, for the respondent.

BLACK, J. The plaintiff, the widow of Joshua Miller, brought this suit to recover damages for the death of her husband who was killed while at work for the defendant on its road at a point between Warrensburg and Montserrat.

The deceased was one of a gang of thirty men, all under the direction and control of Fitzgerald who was their foreman. Fitzgerald and his gang of men were at work raising and ballasting the main track. A gravel train composed of some thirty loaded cars arrived at the place where the men were at work in the afternoon, and it became their duty to unload the same. This was accomplished by the use of a plow. A wire cable, the length of fifteen or sixteen cars, was attached to the plow placed on the rear car. The train was then cut in two, and the other end of the cable made fast to the rear car of the section next the engine. The engine then moved forward drawing the plow over the stationary cars. This done, the engine alone was used to draw the plow over the first section.

The plow removed the bulk of the gravel only and threw some of it between the cars, so that it became the duty of the deceased and the men of his gang to shovel the remaining gravel off the cars, and to remove that which fell between them. On the occasion in question the plow had been drawn over the rear section composed of some fifteen cars, and the deceased and others were on these cars shoveling off the remaining gravel. The first or unloaded section was then backed up and coupled to the second or rear section. It then became the duty of the conductor to take his entire train of cars to the Montserrat siding so as to clear the main track for other trains having the right of way. The conductor gave his engineer a signal to move forward. It seems the deceased was in the act of jumping or stepping from one car to the other just as they began to move, so that the jar threw him down between the wheels.

The evidence for the plaintiff tends to show that the deceased was absorbed in the performance of his work, and that

the train was moved without ringing the bell or giving the deceased and those at work on the cars any warning whatever. On the other hand, the conductor of the train says he told Fitzgerald what his orders were, namely, to take the train to Montserrat; that he notified him to move his men from the cars; that the men were notified to get off before the engine was coupled on; that he asked two or three of the men if the track was clear, and they said it was; that after the men had been notified to get off he gave the engineer the signal to move ahead. The defendant produced other evidence to the effect that the bell was rung a few seconds before the train started.

The plaintiff's first instruction is as follows: "If you find that at the time the train was set in motion by defendant the deceased's attention was occupied by his work, and that no notice or warning was given him of the moving of the train prior thereto, or at the time of such moving, or that if any such notice or warning was given him it was not of such a character as to put a man of ordinary prudence and care, possessed of ordinary acute senses of hearing and seeing, in the circumstances in which deceased was placed, on his guard, and that deceased did not know that the train was about to be moved, and that the setting of said train in motion by defendant was the direct cause of the injury to deceased, and that his death was the result of such injuries, then your verdict should be for the plaintiff."

1. The defendant seeks to be relieved from liability in this case on the ground that Miller lost his life by the negligence of a fellow-servant, thus invoking the rule that the defendant is not liable to one servant for the negligence of a fellow-servant. The case made by the evidence stands on other and different grounds, as we view it. Where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is as to the men under him a vice-principal, and it can make no difference whether he is called a superintendent, conductor, boss, or foreman. For his negligent acts and omissions in performing the duties of the master, the master is liable. This principle of law has been often asserted by this court and applied under a variety of circumstances, as will be seen from the following cases: *Brothers v. Cartter*, 52 Mo. 372; 14 Am. Rep. 424; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Whalen v. Centenary Church*, 62 Mo. 326; *Cook v. Hannibal etc. R. R. Co.*

63 Mo. 397; *Moore v. Wabash etc. R'y Co.*, 85 Mo. 588; *Stephens v. Hannibal etc. R. R. Co.*, 86 Mo. 221; *Hoke v. St. Louis etc. R'y Co.*, 88 Mo. 360; *Smith v. Wabash etc. R'y Co.*, 92 Mo. 360; 1 Am. St. Rep. 729; *Tabler v. Hannibal etc. R. R. Co.*, 93 Mo. 79; *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 900.

There is no doubt but a foreman or other representative of the master may occupy a dual position; that is to say, he may at the same time be a fellow-servant and an agent or representative of the master. There are certain duties which are personal to the master, and for the non-performance of which he is liable to his servants. These duties may be delegated to a foreman or even to a servant, and the master is still liable for their non-performance. Again, cases often arise where the master becomes liable by reason of the fact that he undertakes by himself or through a representative to do certain things which might have been left to the servant to perform. Thus, where the master provides suitable materials for a staging, and intrusts the duty of erecting the structure to the workmen as a part of the work which they undertake to perform, he is not liable for injuries resulting to one of them from the falling of the staging; but if the master undertakes to furnish the stage, he must use due care in its erection, and if there is negligence on his part or on the part of one representing him in that regard, he is liable for injuries resulting to the servant using the structure: *Bowen v. Chicago etc. R'y Co.*, 95 Mo. 277, and cases cited.

It is unnecessary to pursue this inquiry for any of the purposes of the case in hand, for it is one of the absolute duties of the master to use ordinary care to avoid exposing the servant to extraordinary risks; and it is also the duty of the master to use ordinary care and diligence to provide the servant a safe place at which to work. The master, by appointing a foreman or other person to superintend work, with power to direct the men under him when and how to do it, thereby devolves upon such person the performance of those duties personal to the master. These principles of law are illustrated in some of the cases before cited, and also in the following authorities: *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586; *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311; 1 Shearman and Redfield on Negligence, 4th ed., sec. 205. If, therefore, the conductor had the control of the train and of its movements, then he was a vice-principal. So if the foreman had

the control of the section-gang, and the power to direct the men what to do and when to do it, he was also a vice-principal. The conductor being a vice-principal, it became his duty to give due and timely warning of his intention to move the train. If he only gave notice of such intended movement to the foreman, then it became the duty of the latter to give the men at work on the cars notice of the intended movement. If the negligence of either of these persons caused the disaster, then defendant is liable, unless it be found that deceased was guilty of contributory negligence.

Now, there is an abundance of evidence upon which to submit this case to the jury on these principles of law; but the difficulty with the case as it stands is, that the instruction given at the request of the plaintiff utterly fails to make any application of them. It does not require the jury to find facts which would make the conductor or foreman a vice-principal; nor does it require the jury to find that the injury was caused by the negligent act or omission of either of these persons; nor is there anything in the instruction given at the request of the defendant which cures these defects. The plaintiff's instruction seems to have been framed on the theory that the deceased was not an employee or servant of the defendant. The instruction is so clearly erroneous that further comment is unnecessary. We may say that we have not attempted to formulate instructions, but have attempted to state principles which should be embodied in them.

2. The second instruction given at the request of the plaintiff fixes the damage at the sum of five thousand dollars, no more, no less; and of this error is assigned. If the plaintiff's case comes under the second section of the damage act, then the instruction is right; but if under the third section, then it is wrong, for the damages should then be in a sum not exceeding five thousand dollars.

The second clause of the second section relates to passengers only, and hence need not be considered at this time. The first clause, so far as it has any application to this case, provides: "Whenever any person shall die from any injury resulting from or occasioned by the negligence . . . of any officer, agent, servant, or employee whilst running, conducting, or managing any locomotive, car, or train of cars, . . . the corporation, individual or individuals, in whose employ any such officer, agent, servant . . . shall be at the time such

injury is committed shall forfeit and pay for every person so dying the sum of five thousand dollars," etc.

In the case of *Sullivan v. Missouri Pac. R'y*, 97 Mo. 113, we held that, where an employee of a railroad company is killed in the manner and by the means mentioned in the above-recited portion of the statute, the measure of the damage is five thousand dollars, if there can be any recovery at all; but that case holds that the defenses of contributory negligence, and that the death was due to the negligence of a fellow-servant, are open to the defendant the same as in cases coming under the third section. As that ruling is questioned in this case, it may be well enough to review the prior adjudication upon this subject.

The first case which came before this court was that of *Schultz v. Pacific R. R. Co.*, 36 Mo. 14. There one servant was killed by the negligence of a fellow-servant in running a train, and it was held that the defendant was liable under this statute. The effect of that ruling was to make the statute abolish the defense that the servant was killed by the negligence of a fellow-servant, whilst running a locomotive or a train of cars. So far as *Rohback v. Pacific R. R. Co.*, 43 Mo. 187, has anything to do with the question in hand, it is an approval of the Schultz case.

The Schultz case was again approved in *Connor v. Chicago etc. R. R. Co.*, 59 Mo. 285, by a majority of the court. Napton, J., was of the opinion that the statute was not designed to create any new liability, but simply to extend a pre-existing responsibility to certain representatives of the injured party, in case of death. In that case, one servant lost his life by the negligence of a fellow-servant. It was conceded by Judge Napton that the company would be liable if it had been guilty of negligence, in employing an unskillful engineer, or in allowing him to turn over the engine to a fireman who was not qualified to manage it, and the damage resulted from such conduct of the engineer or fireman. It is not there claimed by him that the case would, in either of such events, come under the third section of the damage act. His whole line of argument shows that the case would then have been based upon the second section, and the damages would be fixed at five thousand dollars.

In *Proctor v. Hannibal etc. R. R. Co.*, 64 Mo. 117, one servant was killed by the negligence of a fellow-servant in running a train, and the widow brought suit to recover the

penalty of five thousand dollars. The court, after referring to the statute, states the question to be decided in these words: "Whether, under the words 'any person,' in said section, a fellow-servant, whose death is occasioned by the negligence of a fellow-servant, without fault of the master, is or was intended to be included." The question to be decided was, it will be seen, carefully stated. It was not simply whether the words "any person" included a servant, whose death was occasioned by the negligence of a fellow-servant, but whether the death was so occasioned without fault of the master. The court first refers to the rule of law which exempts the master from liability where one servant is injured by the negligence of a fellow-servant, and the conclusion is then reached that it was not the design of the statute to abolish that rule, even as to cases mentioned in the first clause of the section, thus, in terms, approving the views previously expressed by Judge Napton. The construction given to the statute by the Proctor case is still the rule of this court. There is not a thing in that case, or in the prior cases, which gives any countenance to the proposition that, in case of the death of an employee, the action must always be under the third section.

The Proctor case refutes any such a claim; for it proceeds upon the principle that the second and third sections were not intended to create an entirely new liability, but were designed to continue or transmit the right to sue, which the injured party would have had had he lived. The first inquiry, therefore, in all of these cases is, whether the representatives of the deceased person have any cause of action at all. If the injury was the result of negligence on the part of the deceased, or was occasioned by a fellow-servant, then there is no cause of action; but if occasioned by the fault of a representative of the master, then the master is at fault and liable. It being once ascertained that the widow, or other representatives, have a cause of action, the damages will be five thousand dollars, if the injury, resulting in death, was occasioned by negligence, "whilst running, conducting, or managing any locomotive, car, or train of cars"; and the fact that deceased was an employee is wholly immaterial. Neither the statute nor the Proctor case can be tortured into any other conclusion. They are both plain enough on this question.

Elliott v. St. Louis etc. R. R. Co., 67 Mo. 272, was a case where an employee was killed in consequence of the use of defective machinery. The case did not come under the first

clause of the second section, nor did it come under the second, for the second clause relates to passengers only; hence it was properly held that the case came under the third section. That case is therefore in perfect accord with what we have said. An observation there made to the effect that, under the Proctor case, no action can be maintained by an employee, is inaccurate and misleading, for we have seen the Proctor case does not go to that extent. A defective track was also the ground of action in *Flynn v. Kansas City etc. R. R. Co.*, 78 Mo. 195, 47 Am. Rep. 99, and a defective car constituted the basis of action in *Parsons v. Missouri Pac. R'y Co.*, 94 Mo. 286; and in *Holmes v. Hannibal etc. R. R. Co.*, 69 Mo. 536, the employee was killed by the use of a defective car. These cases are, therefore, also in line with what we have said. It may be that the inaccurate expression used in the Elliott case has led to a different result in one or two cases, but we adhere to the Proctor case.

Where, therefore, the representatives of a deceased employee are entitled to recover, the damages are fixed at five thousand dollars if the injury, resulting in death, was occasioned by negligence in running, conducting, or managing any locomotive, car, or train of cars.

For the errors in the plaintiff's first instruction, the judgment must be, and is, reversed, and the cause is remanded. All concur.

MASTER AND SERVANT — VICE-PRINCIPAL — LIABILITY OF MASTER FOR NEGLIGENCE OF. — A local boss who is given authority to control and direct men and machinery and discharge the men is a vice-principal, and the master is liable for his negligence: *Orman v. Munnix*, 17 Col. 564; 31 Am. St. Rep. 340, and note. If the negligent servant can be fairly said to take the place of the master and represent him, then he becomes the vice-principal, and the master is liable for his negligent acts: *Colorado etc. R'y Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note. See extended note to *Adams v. Irons Cliffs Co.*, 18 Am. St. Rep. 455-458.

MASTER AND SERVANT — VICE-PRINCIPAL, RAILWAY FOREMAN OF CONSTRUCTION IS. — See *Colorado etc. R'y Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note; *Sweeney v. Gulf etc. R'y Co.*, 84 Tex. 433; 31 Am. St. Rep. 71, and note.

RAILROADS — CONDUCTOR, WHEN VICE-PRINCIPAL: See *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47.

STATE v. WARREN.

[109 MISSOURI, 430.]

FORGERY — SUFFICIENCY OF INDICTMENT. — An indictment alleging that the accused uttered and published a forged check, knowing it to be forged, with intent to cheat and defraud, is sufficient, although it does not allege the name of the party intended to be defrauded.

FORGERY — ESSENTIAL ELEMENT OF. — Intent to defraud is an essential element of the crime of forgery. It must therefore be alleged and proved.

FORGERY — ERRONEOUS INSTRUCTIONS. — Instructions authorizing a conviction of forgery, but wholly omitting the issue of defendant's fraudulent intent, are erroneous.

FORGERY — FICTITIOUS SIGNATURES. — Signing the name of a fictitious person, with intent to defraud, is a forgery.

FORGERY — IMPERFECT IMITATION OF REAL SIGNATURE. — When one signs the name of a person really existing, but does it so imperfectly or inaccurately that anyone of ordinary prudence would not be deceived by it, he cannot be convicted of forgery; and the question whether or not the attempted forgery was so imperfect as to deceive a man of ordinary prudence, is generally one for the jury.

W. G. Phetzing and John Welborn, for the appellant.

John M. Wood, attorney-general, for the state.

THOMAS, J. Defendant was sentenced to imprisonment in the penitentiary for a term of seven years, by the criminal court of LaFayette County, for uttering and publishing a forged check.

In January, 1891, he had in his possession a check purporting to have been drawn by Thomas Scramshey on the Morrison-Wentworth Bank of Lexington, payable to R. W. Warren or bearer for \$93, which he asked two or three men to cash, stating that it was drawn by Thomas Stramche. The parties to whom he presented it refused to take it and give him the money on it.

The evidence shows that a man by the name of Thomas T. Stramche lived near Lexington, but no one knew any person by the name of Thomas Scramshey. There was evidence tending to prove the insanity of the defendant, a defense which he interposed, and it clearly appeared in evidence that at the time he was trying to get the money on the check he was under the influence of liquor.

1. The fourth count of the indictment under which defendant was found guilty avers that he uttered and published the forged check knowing it to be forged, with intent to cheat and defraud without giving the name of the party he intended to

defraud. This is sufficient under our statute: *State v. Phillips*, 78 Mo. 49; *State v. Rucker*, 93 Mo. 88.

2. But, while it is not necessary that an indictment for uttering a forged instrument should charge an intent to defraud any particular person, yet the intent to defraud is an essential element of the crime, and it must be averred and proved: Kelley's Criminal Law and Practice, sec. 728; 3 Greenleaf on Evidence, sec. 103; 8 Am. & Eng. Ency. of Law, 459.

In the case at bar the court in all its instructions authorizing a conviction under the fourth count, wholly omitted the issue of defendant's fraudulent intent. This was error, and it was emphasized by the refusal of the court to instruct the jury, though requested by defendant, that before they could find him guilty they must find that "he intended to defraud some one."

The court erred also in refusing the following instruction asked by defendant: "The court instructs the jury that although you may believe from the evidence that the defendant made, forged, and counterfeited the check introduced and read in evidence, and that the defendant when he made, forged, and counterfeited said check read in evidence intended to make, forge, and counterfeit a check to resemble and be like a genuine check of the said Thomas T. Stramke and that he attempted to pass said check as a true and genuine check of said Thomas T. Stramke and the intent to injure and defraud, yet if the jury further believe from the evidence that said check so made and read in evidence upon its face had no resemblance to a true and genuine check of Thomas T. Stramke, and that said check would not deceive or mislead a person of ordinary understanding then there is no forgery in this case, and the jury will find the defendant not guilty under each and every count in the indictment."

While signing the name of a fictitious person, with intent to defraud, is as much a forgery as signing the name of a person actually existing, yet where the accused attempts to sign the name of a person really existing, but does it so imperfectly or inaccurately that one of ordinary prudence would not be deceived by it, he cannot be convicted of forgery: *State v. Covington*, 94 N. C. 913; 55 Am. Rep. 650, and cases cited; *Rembert v. State*, 53 Ala. 467; 25 Am. Rep. 639; 2 Russell on Crimes, 9th ed., 722-724; Kelley's Criminal Law and Practice, sec. 726.

The evidence clearly shows that Thomas Stramche was well

known to the parties to whom defendant presented the check, and that he told them it was drawn by Thomas Stramche, but it appears the name actually signed to it was Thomas Scramshey, while the indictment averred that the name was Thomas Scramsky.

We think, under this state of facts, the court ought to have left it to the jury to say whether the attempted forgery of the name of Thomas T. Stramche was so imperfect and inaccurate as not to deceive a man of ordinary prudence, modifying the instruction so as to apply the principle to the uttering as well to the forging of the check.

The judgment is reversed and cause remanded for new trial. All concur.

GANTT and MACFARLANE, JJ., concur for the reason set out in paragraph 2.

FORGERY. — SUFFICIENCY OF INDICTMENT FOR: See notes to *Haskins v. Ralston*, 13 Am. St. Rep. 381; *State v. Cross*, 9 Am. St. Rep. 68. The indictment for forgery is sufficient if it charges the offense with such degree of certainty as to enable the court to pronounce a proper judgment in case of conviction: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note. It is not necessary to allege the name of the person intended to be defrauded: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53.

FORGERY — ESSENTIAL ELEMENT OF CRIME. — The essential element of forgery consists in the intent to defraud: *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note; *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note; *State v. Floyd*, 5 Strob. 58; 53 Am. Dec. 689, and note; *State v. Hall*, 108 N. C. 776; *Hawkins v. State*, 28 Fla. 363. See also extended note to *Arnold v. Cost*, 22 Am. Dec. 306.

FORGERY — SIGNING FICTITIOUS NAME. — This question is discussed in the note to *Arnold v. Cost*, 22 Am. Dec. 308. A person charged with forging a check signed by a firm name cannot be convicted under the California Penal Code, sec. 470, if there is no firm by that name, but is guilty of passing a fictitious check and should be prosecuted under sec. 476 of the Penal Code: *People v. Elliott*, 90 Cal. 586.

FORGERY. — NECESSARY SIMILITUDE: See note to *Arnold v. Cost*, 22 Am. Dec. 321; also note to *State v. Covington*, 55 Am. Rep. 652.

STATE v. MONTGOMERY.

[109 MISSOURI, 615.]

INDICTMENT—SUFFICIENCY OF.—When a crime may be committed by several methods, the indictment may charge that it was committed by all, provided the different methods are not inconsistent with or repugnant to each other.

INDICTMENT FOR ATTEMPT TO ROB—SUFFICIENCY OF.—An indictment charging that the accused and another attempted to commit robbery by attempting to take by force a sum of money belonging to a certain third person, by violence to his person, and by putting him in fear of some immediate injury to his person, is sufficient as charging an attempt to rob.

Travers, Havens, Harrington and Pepperdine, for the appellant.

John M. Wood, attorney-general, for the state.

THOMAS, J. The defendant was convicted of an attempt to commit robbery, and was sentenced to imprisonment in the penitentiary therefor for two years by the criminal court of Greene County in August, 1891, and he appealed.

The only point insisted upon by appellant for a reversal of the judgment is the insufficiency of the indictment.

The defendant in his brief says: "The indictment is for an attempt to rob. In an indictment for an attempt, the attempted offense must be set out as though the indictment were for the commission of the offense. Section 3230, Revised Statutes, 1889, on which the indictment in this case is bottomed, sets forth four separate and distinct felonies, either of which constitutes robbery in the first degree: 1. Every person who shall feloniously take the property of another from his person by violence to his person. 2. Every person who shall feloniously take the property of another in his presence and against his will by violence to his person. 3. Every person who shall feloniously take the property of another from his person by putting in fear of some immediate injury to his person. 4. Every person who shall feloniously take the property of another in his presence, and against his will, by putting in fear of some immediate injury to his person. All these cannot be charged in one count. Each one constitutes a separate and distinct offense. There is but one count in this indictment. Which one of the four offenses does it charge? Or does it not attempt to charge them all in one count?"

We think this is not the true exposition of the statute. The section cited does not define four distinct felonies, but defines one felony only, which may be committed by several methods. When a crime may be committed by several methods the indictment may charge that it was committed by all, provided the different methods are not inconsistent with or repugnant to each other: *State v. Murphy*, 47 Mo. 274; *State v. Fancher*, 71 Mo. 460; *State v. Pittman*, 76 Mo. 56; *State v. Bregard*, 76 Mo. 322; *State v. Fitzsimmons*, 30 Mo. 236; Kelley's Criminal Law and Practice, sec. 186; 10 Am. & Eng. Ency. of Law, 599b, 599c, 599d.

Stripped of its verbosity, the indictment in this case charges that the defendant and Ben Montgomery attempted to commit the crime of robbery, by attempting to take by force \$170 belonging to George C. Milburn, in the latter's presence, from his person, by violence to his person, and by putting him in fear of some immediate injury to his person. These averments are not repugnant to, but perfectly consistent with, each other.

Section 3940, Revised Statutes, 1889, provides that "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same," shall be guilty of a crime.

The indictment in this case, after making the averments above set out, charges that defendant and Ben Montgomery, in the attempt toward the commission of the crime of robbery, went to the dwelling-house of said Milburn, armed with a pistol and ax, broke down the door, fired the pistol into the house, and demanded of said Milburn the said money or they would kill him, but that they failed in such attempt by being frightened away by said "Milburn hallooing murder," and that they were "intercepted and prevented in the execution of the same."

This is a sufficient averment of the doing of an act toward the commission of a crime in an attempt to commit it.

Other objections to the indictment are urged by defendant, but we think they are verbal criticisms merely of the phraseology used, and do not amount to serious defects in the essential and substantial averments of the crime. The judgment is affirmed. All concur.

INDICTMENT — SUFFICIENCY OF. — An offense may be charged in different ways in different counts of the indictment: *State v. Clement*, 42 La. Ann. 583; *State v. Morgan*, 35 W. Va. 260.

ROBBERY — SUFFICIENCY OF THE INDICTMENT. — An indictment charging that the defendant did "willfully and feloniously, by force and violence, rob," etc., is sufficient: *State v. Patterson*, 42 La. Ann. 934; *Thomas v. State*, 91 Ala. 34. See also *State v. Stoffel*, 48 Kan. 364, for the sufficiency of indictment charging different degrees of robbery. An indictment for robbery must state that the property was taken from the person of another; to say that it was taken from him is insufficient: *Stegar v. State*, 39 Ga. 583; 99 Am. Dec. 472, and note.

STATE v. HOUX.

[109 MISSOURI 654.]

RAPE — SUFFICIENCY OF INDICTMENT FOR. — An indictment for rape charging the act of felonious carnal knowledge to have been committed on a certain day with a female child under the statutory age of consent, is sufficient, if such age is stated.

RAPE. — **INDICTMENT FOR RAPE CHARGING** force, and want of consent, need not allege the age of the female, or state that she was over the statutory age of consent.

INDICTMENT — JOINDER OF FELONIES IN. — Several distinct felonies may be charged in the same indictment when all relate to the same transaction, and admit of the same legal judgment, and as a rule the prosecution will not be required to elect on which count it will proceed in such case.

RAPE — EVIDENCE. — A person on trial for rape will not be permitted to prove that he had reason to believe that the prosecutrix was, at the time of the carnal knowledge, over the statutory age of consent.

RAPE — AGE OF CONSENT — PUBERTY. — When the statute defining rape fixes the age at which the female is deemed incapable of consent, the act of carnally and unlawfully knowing a female under that age is a rape, though she had attained the state of puberty.

RAPE — EVIDENCE OF PHYSICAL CONDITION OF FEMALE — WHEN TOO REMOTE. — On a trial for rape it is competent to prove the physical condition of the female immediately after the outrage as tending to establish the commission of the offense, but evidence of her condition three months thereafter is too remote, and is therefore inadmissible. Error in admitting it is, however, harmless when the guilt of the accused is clearly established by other evidence, and the verdict fixes the lowest punishment prescribed by the statute.

WITNESS — EVIDENCE OF PREVIOUS IMMORALITY. — A witness cannot be compelled to testify to his previous immorality when such testimony does not tend directly to prove some issue.

WITNESS — IMPROPER CROSS-EXAMINATION — HARMLESS ERROR. — An improper cross-examination of a person accused of crime, from which no prejudice or harm could possibly result, is not reversible error.

RAPE — AGE OF CONSENT — BURDEN OF PROOF. — On the trial of a person accused of committing a rape upon a girl under the statutory age of consent, the burden of proof is on the prosecution to prove that she was under that age, but there is no presumption that she had arrived at such age.

S. P. Sparks, for the appellant.

John M. Wood, attorney-general, for the state.

MACFARLANE, J. Defendant was indicted by the grand jury of Johnson County for an alleged rape upon Mattie Sidenstricker. A change of venue was taken to Saline County, where the case was tried and defendant convicted and sentenced to five years' imprisonment in the penitentiary. From this sentence defendant appeals.

The indictment contains two counts, the first charging: "That Robert Houx, late of the county of Johnson, and state of Missouri, on the eighth day of July, A. D. 1889, at the county of Johnston and state of Missouri, in and upon one Mattie Sidenstricker, a female child under the age of twelve years, to wit, of the age of ten years, unlawfully and feloniously did make an assault, and her, the said Mattie Sidenstricker, then and there unlawfully and feloniously did carnally know and abuse."

The second count charged a rape on the said Mattie, on the same day, forcibly and against her will.

The verdict of guilty was on the first count, and of not guilty on the second.

Defendant unsuccessfully demurred to each count of this indictment. The ground of demurrer on the first count was that it failed to affirmatively allege that the complaining witness was "then and there being" a female child under twelve years of age. In other words, it was not sufficiently averred that at the time of the alleged outrage the said Mattie was under twelve years of age.

1. The liberality allowed in criminal pleadings under our practice act has never been so extended as to permit the omission from the indictment of a sufficiently distinct charge of every substantive fact necessary to constitute the offense: *State v. Reakey*, 62 Mo. 42; *State v. Sides*, 64 Mo. 383.

The first count in the indictment is drawn under that part of section 1253, Revised Statutes, 1879, which makes it a capital offense to have carnal knowledge of a female child under twelve years of age, though accomplished without force and with the consent of the victim.

It is very clear that the age of the child, at the time of the act, is a fact upon which the criminality of the act absolutely depends, and it should therefore be clearly and definitely charged. Approved forms and precedents for indictments for

felonies, which it is always safer for the pleader to follow, after once averring the time and place of the offense, thereafter designate them by the terms "then and there." The use of this formula was not necessary, but was adopted for convenience. All that is required is a clear statement of the fact: *State v. Luke*, 104 Mo. 569; *State v. Steeley*, 65 Mo. 221; 27 Am. Rep. 271; *State v. Sundheimer*, 93 Mo. 313.

This count in the indictment charges the act of carnal knowledge to have been committed on a certain day, and with a female child under twelve years of age. There was no occasion for any purpose to repeat this allegation.

2. The verdict being for defendant on the second count, it is unnecessary to consider its sufficiency. The rule is, however, that the indictment for rape, charging force and want of consent, need not allege the age of the female, or state that it was over twelve years: 2 Bishop on Criminal Procedure, sec. 954; Bishop on Statutory Crimes, sec. 846. The charge in the second count was sufficient.

3. Before the trial commenced, and again at the close of the evidence in chief by the state, defendant, by motion, requested that the prosecuting attorney be required to elect upon which count of the indictment he would proceed. These requests were denied, and defendant assigns as error the ruling of the court in doing so.

It is insisted in the first place that the offenses charged in the two counts are distinct and independent crimes, and repugnant to each other, and a joinder of them, though in separate counts, was improper, and for that reason an election should have been required.

It is the common and approved practice in this state to charge in the same indictment several distinct felonies, when all relate to the same transaction and admit of the same legal judgment: *State v. Porter*, 26 Mo. 206; *State v. Mallon*, 75 Mo. 355; *State v. Miller*, 67 Mo. 604; *State v. Green*, 66 Mo. 631. By section 1253, rape is defined to be either carnal knowledge of a female child under the age of twelve years, or forcibly ravishing a woman of the age of twelve years or upwards. The two counts in this indictment relate to the same transaction, that of unlawfully and feloniously having carnal knowledge of the complaining witness. The punishment for each is the same. The crimes charged are the same. The proof necessary to establish them alone differs. In such case it is "usual to form several counts for the purpose of meet-

ing the evidence as it may transpire at the trial": 1 Bishop on Criminal Procedure, sec. 446; *State v. Porter*, 26 Mo. 206; *State v. Sutton*, 4 Gill, 494; *Bonner v. State*, 65 Miss. 294.

4. Whether the state should be required to elect upon which count in an indictment it will proceed to trial is regulated in all cases by sound judicial discretion; but as a rule no election will be required when the different counts relate to but one transaction, as in this case: *State v. Porter*, 26 Mo. 206; *State v. Green*, 66 Mo. 631; *State v. Mallon*, 75 Mo. 355.

Defendant offered, and the court refused to admit, testimony tending to prove that he had reason to believe that the prosecutrix was, at the time of the carnal knowledge, over the age of twelve years. We do not think that the court committed error in this. "His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case when he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences": Wharton on Criminal Evidence, sec. 724; *State v. Griffith*, 67 Mo. 287; *Lawrence v. Commonwealth*, 30 Gratt. 845; *State v. Newton*, 44 Iowa, 45.

5. Defendant asked instructions based on the theory that this statute, by employing the words "female" and "child," meant to designate a female who had not arrived at the age of puberty, and though this girl was under the age of twelve years, if she was in fact a developed woman, carnal knowledge of her with consent was not rape under the statute. These instructions were refused.

We do not think the designation "child" and "woman," as applied to females in this section, were intended to refer to actual childhood and womanhood as generally understood. If such had been the intention no age would have been fixed, as it is well known that the age at which womanhood is reached varies in different females. To secure certainty and avoid controversies an arbitrary age of consent has always been designated, without reference to physical development. Under statute of 18 Elizabeth, a girl under ten years was conclusively presumed to be incapable of consent, and it was rape to have carnal knowledge of her with or without her consent: 1 Hale's Pleas of the Crown, 631. Like construction has been given the statutes of the states: *Coates v. State*, 50 Ark. 330, and authorities cited; *People v. Gordon*, 70 Cal. 467.

Evidently the purpose of the statute was to fix an age in the life of females when they should be deemed incapable of

consent to sexual intercourse. It could never have been intended that carnal knowledge of a child over twelve years would not be rape, though accomplished with force and without consent. Such would be the result of the construction insisted upon by defendant.

Counsel relies upon *Blackburn v. State*, 22 Ohio St. 110, to sustain his theory. The statute of Ohio names three classes of females upon whom rape may be committed: A woman; a female child; a female child under ten years with her consent. The court held that it was at the age of puberty, and not at the age of majority, that a female ceases to be a child, and becomes a woman within the meaning of the statute. There is no similarity in the statutes, and this decision cannot be used as a guide in the interpretation of the statute of this state.

6. The court permitted witnesses to state the physical condition and suffering of the child from the day the act was committed until some months thereafter. It was competent to prove the physical condition of the girl immediately after the outrage, as tending to prove the commission of the offense, but evidence of her condition three month thereafter was too remote to throw any light on the real issues in the case. Its only effect could have been to show an aggravation of the offense, and excite abhorrence in the minds of the jury, and thereby increase the punishment. If there was a suspicion of prejudice shown by the verdict we might feel it our duty to reverse the judgment for this error. Defendant, while testifying, confessed the sexual act, and thereafter the only issues were whether the girl was over twelve years of age, and if so, whether force was used. The verdict of guilty was to the first count, and the finding necessarily included the finding that the child was under the age of twelve years, and the evidence clearly established the fact. The verdict fixed the lowest punishment prescribed by the statute, and therefore the objectionable evidence was clearly harmless.

7. On cross-examination of the mother of the prosecutrix, defendant's counsel undertook to require her to answer inquiries as to specific acts of alleged immorality commencing at a period twenty years previous, and also general questions as to the morality of her previous life. Defendant attempted to justify these inquiries on the ground that they tended to impeach the witness.

A witness should not be required to give such testimony, when it does not tend directly to prove some issue. "And

the reason is, that every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and aside from this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness-box would become itself a scandal, which no civilized community would tolerate": Wharton's Criminal Evidence, sec. 472.

8. Objection is made to the ruling of the court in permitting counsel for the state, on cross-examination of defendant as a witness, to question him as to whether he had not given certain evidence in a *habeas corpus* proceeding on a previous occasion.

It does not appear that defendant was examined in chief as to such previous testimony, and it was not proper for the state to cross-examine him in reference to it; but a comparison of the testimony given on this trial, with the testimony about which he was examined, shows that they were substantially the same, and no prejudice could possibly have resulted from such cross-examination.

9. The court refused to give the eighth instruction asked by defendant. This instruction told the jury that the law presumed that Mattie Sidenstricker was on the eighth day of July, 1889, above the age of twelve years, and the burden was on the state to establish beyond a reasonable doubt that she was not of that age on said day.

As has been said, the age of the girl was a material fact to be specially charged in the indictment and proved upon the trial. The burden was on the state to establish the fact, but we cannot say that there was a presumption that the girl was over the age of twelve years. The court did instruct the jury that unless they were satisfied from the evidence, beyond a reasonable doubt, that at the time the defendant had sexual intercourse with the girl she was under the age of twelve years, they should acquit on the first count of the indictment. The court further declared in another instruction that the presumption of defendant's innocence "abides and continues throughout the case," and that they should acquit "unless the state has established to your satisfaction beyond a reasonable doubt that defendant is guilty."

The presumptions declared in this instruction were all that could be demanded. They placed the burden of proof on the state, where it belonged.

After a careful examination of the record, and the elaborate

and exhaustive brief of counsel for defendant, we conclude that there was no error which could have been prejudicial to defendant, and the judgment is affirmed. All concur.

RAPE — INDICTMENT — ALLEGATION OF AGE OF PROSECUTRIX. — An indictment for rape of a female of unmentioned age will not support a conviction of the offense of carnal knowledge without her consent of a female under the age of puberty: *Warner v. State*, 54 Ark. 660. An indictment for carnally knowing a female under fourteen years of age, "with or without her consent" must allege the age of the female: *State v. Wheat*, 63 Vt. 673.

RAPE — INDICTMENT — CONSENT. — It is not necessary to allege or prove in a prosecution for an assault to commit rape upon a girl under the statutory age of consent, that the acts were done against her will. Whether she consented or not is immaterial: *Davis v. State*, 31 Neb. 247; *contra see Whitcher v. State*, 2 Wash. 286; see note to *McGuff v. State*, 16 Am. St. Rep. 30; also extended note to *Smith v. State*, 80 Am. Dec. 364, 365, 374.

RAPE — PHYSICAL EXAMINATION OF PROSECUTRIX — EFFECT OF DELAY. — Upon a trial for rape the prosecution may show the result of a medical examination of the female though the examination did not take place for a year after the date of the alleged offense, and the effect of the delay upon the force of this evidence is for the jury: *Commonwealth v. Allen*, 135 Pa. St. 483.

RAPE OF CHILD UNDER AGE OF CONSENT — PUBERTY. — **EFFECT OF:** See extended note to *Smith v. State*, 80 Am. Dec. 363.

INDICTMENT — JOINDER OF DISTINCT OFFENSES. — Where several offenses are embraced in the same general definition and are punished in the same manner they may be charged in the same count of the indictment: *Laroe v. State*, 30 Tex. App. 374. An indictment charging disjunctively offenses of the same character and subject to the same punishment will support a general verdict of guilty: *McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25, and note; *Howell v. State*, 29 Tex. App. 592; *Martin v. State*, 30 Neb. 507; *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833, and note. See also note to *Ben v. State*, 58 Am. Dec. 247, and *King v. State*, 66 Miss. 502.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK

KENT v. CHURCH OF ST. MICHAEL.

[136 NEW YORK, 10.]

REMAINDERS FOR AFTER-BORN CHILDREN. — Under a will by which a testator devises all his estate to trustees to be by them divided into equal parts, and directs them to pay the income of one part to each of his children during their lives, and after the death of any child, to pay over and divide the said share among his or her children then surviving, and the lawful issue of such child or children who may die leaving issue, in equal proportions *per stirpes*, each of the grandchildren takes a vested remainder in the share of his parent, liable, however, to open and let in afterborn grandchildren, and the rights of these latter cannot be destroyed by a conveyance executed by the trustees and the other persons in being.

LOST UNRECORDED CONVEYANCE, POWER TO REPLACE. — If a conveyance of land, not being recorded, has been lost, there is no doubt that equity will relieve the grantee or his successors in interest by compelling the grantor or his successors in interest to execute another conveyance. The right to this relief does not depend upon any statutory provision, but has its sanction in the general jurisdiction of courts of equity.

JUDGMENTS, WHEN BIND PERSONS NOT IN BEING. — If an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, represent the whole estate, and stand not only for themselves but also for the persons unborn, and a judgment entered in such litigation binds their interest, if it provides for and protects them, and also if the court determines that they have no interest to be protected. Therefore a judgment establishing the existence of a conveyance from the person from whom they all derived title and that it was lost before being recorded, and directing another conveyance to be made in lieu of that so lost, is binding upon the persons not then in being.

VENDOR AND VENDER — WAIVER OF TIME OF PERFORMANCE. — If a contract for the sale of real property designates a time when the vendor is to make a conveyance, and he is not able to make it at that time, the

right of the vendee to object to delay is waived by a subsequent oral agreement under which he was authorized to take and did take and hold possession and under which he still has possession when the conveyance is tendered, and the action brought for a specific performance.

John J. Delany, for the appellant.

Everett Greene, for the respondents.

EARL, C. J. The plaintiffs are executors under the will of James Kent, deceased. The testator devised all his property to his executors as trustees in trust, to pay the net income thereof to his wife during her life, and he authorized and empowered them to sell any of his real estate. It is not questioned that a valid trust was thus created, that the legal title to the real estate devised was vested in the trustees, and that they had a valid power of sale. In April, 1890, in the exercise of the power of sale, they entered into a written contract with the defendant, by which they agreed to convey to it certain real estate of which they claimed their testator was seised at the time of his death, and they agreed to execute to it an executors' deed on the second day of June thereafter "containing the usual covenants, and assuring to them the fee-simple of the said premises free from all encumbrances."

At the time and place named in the contract it was ascertained that the testator had no record title to one half of the land contracted to be sold, and no deed to him for that half could be found. The defendant, therefore, refused to take a deed of that half of the land, but took a deed of the other half and paid therefor; and then another written contract was made between the parties, by which it was agreed that the plaintiffs, for the consideration named, should, within six months thereafter, convey to the defendant an indefeasible title to the one half of the land mentioned. The plaintiffs' testator had in fact purchased that half of Helen L. R. Stewart and paid for it, and taken a deed thereof which had not been recorded and was lost. She had died leaving a will in which she devised to trustees all her real estate, to be by them divided into three equal parts, directing them to pay the income of one part to each of her three children during the lives of her children respectively, and after the death of any child to pay over and "divide the said share to and among his or her children then surviving, and the lawful issue of any such child or children, who may have died leaving issue, in equal proportions, *per stirpes*."

After the making of the second contract the plaintiffs commenced an action, in which they made defendants the trustees under the will of Mrs. Stewart, her three children and only heirs, and also her grandchildren, who were infants, alleging in their complaint that in October, 1877, Mrs. Stewart conveyed the land in question to James Kent by deed properly acknowledged; that at that time Kent paid to her substantially all the purchase price, and went into the possession of the land and remained in possession until November, 1886, when he died seised and possessed of the land in fee-simple absolute. They then alleged the will of James Kent, the death of Mrs. Stewart and her will, the contract of sale with the defendant, and the loss of the deed from Mrs. Stewart unrecorded, and the fact that it could not be found after diligent search, their belief that it had been lost, that they and their testator had been in possession of the land for twelve years claiming the same absolutely in fee, and that owing to the loss of the deed there is a cloud on the title to the land, and that thus the defendants have on the record an unjust claim to the same; and they prayed judgment that the defendants in that action execute and deliver to them a good and sufficient deed so as to vest and confirm the title to the land absolutely in them as the representatives of the estate of Kent, and for such other and further relief as the court should deem proper. The defendants were all adults but the grandchildren, and for them a special guardian was appointed. The adults answered the complaint admitting the allegations thereof, and the infants, by their guardian, answered the complaint by putting in issue the allegations thereof. The action was brought to trial, and the facts alleged in the complaint were established and found, and judgment was given to the plaintiffs pursuant to the prayer of the complaint. In compliance with the judgment, the adult defendants, in their own names, and the infant defendants, by their special guardian, executed a deed of the land to these plaintiffs and all the devisees and heirs at law of James Kent, deceased. The parties of the second part in that deed then united in executing a deed of the land to the defendant, and it refused to accept the same when tendered to it by the plaintiffs, on the ground that the title tendered was still defective.

Under the will of Mrs. Stewart, her grandchildren took vested remainders in the shares of their parents, liable, however to open and let in after-born grandchildren. Thus the

trustees, children, and living grandchildren represented the entire estate of Mrs. Stewart, subject, however, to the contingency that there might be after-born grandchildren; and it was upon this contingency that the defendant based its objection to the title tendered to it, the claim being that after-born grandchildren would not be concluded by the judgment which had been rendered, and that their rights would not be affected by the deed given in pursuance of that judgment. The sole question for our determination is whether that claim is well founded.

There is no doubt that if the defendants in the action brought by these plaintiffs against Mrs. Stewart's executors, children, and grandchildren represented the whole title to her real estate, then the action was proper, and the conveyance given in pursuance of the judgment would carry a good title to the defendant. The deed from Mrs. Stewart, by some accident, had been lost after James Kent had paid for the land and had been in possession of the same for many years, claiming title thereto, and on account of the loss his executors could not make a good record title to the land in pursuance of their contract with the defendant. Under such circumstances there can be no question that a court of equity had power and jurisdiction to relieve the persons who represented the grantee, and who in fact had title to this land, from the dilemma in which they were placed by the loss of the deed, by compelling Mrs. Stewart, if living, and after her death those who represented her title, to execute another deed.

A purchaser under a valid contract of purchase, who has performed the contract on his part and is entitled to a deed from his vendor, can compel specific performance of his contract by the delivery of the deed to him in pursuance thereof, and this can be done in the exercise of the jurisdiction of a court of equity to compel the specific performance of contracts; but where the contract has been performed and the deed given, which the purchaser by some accident or misfortune has lost so that he has no record title to the land which was conveyed to him, it is well settled that a court of equity will compel the vendor to execute another deed so as to clothe the purchaser with the record title; and an action for that purpose is not dependent upon any provisions of the code contained in sections 1638, 1650, and 2345, to which our attention has been called. It has its sanction in the general jurisdiction of a court of equity. Under such circumstances it would be in-

equitable for the vendor to retain the record title and to refuse to execute a new deed, and the purchaser can be relieved only by the execution of a new deed: Sugden on Vendors, c. 11, sec. 4, subd. 15; Adams's Equity, 166, 337; Willard's Equity, 52, 301; *Cummings v. Coe*, 10 Cal. 529. Therefore the judgment against the trustees and heirs of Mrs. Stewart was in a proper action and proper form, and the question is whether it will bind the after-born grandchildren, if any, of Mrs. Stewart. We think it will.

The trustees, children, and grandchildren of Mrs. Stewart could not cut off or affect the title in the land of unborn grandchildren by any conveyance *in pais*: Rev. Stats., part 2, c. 1, tit. 2, art. 1, sec. 14. By such a conveyance they could convey no greater title than they had. The effect of such a conveyance was under consideration in *Kilpatrick v. Barron*, 125 N. Y. 751, and *Harris v. Strodl*, 132 N. Y. 392.

If the title to this land had actually been devolved under the will of Mrs. Stewart, and an action were brought to partition it, or to foreclose a mortgage upon it, or in some other way to change or extinguish the title, it would be the duty of the court to protect the rights of unborn grandchildren by setting apart land, or the proceeds of the land, to represent in some form their interests: *Cheesman v. Thorne*, 1 Edw. Ch. 629; *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455; *Brevort v. Grace*, 53 N. Y. 245; *Monarque v. Monarque*, 80 N. Y. 320.

Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons: Calvin on Parties, 48; Mitford's Pleadings, 173; 2 Spencer's Equitable Jurisdiction, 707; 1 Smith's Chancery Practice, 92; Story's Equity Pleading, secs. 144, 148; *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 643; *Nodine v. Greenfield*, 7 Paige, 544; 34 Am. Dec. 363.

But here this land did not pass under the will of Mrs.

Stewart. All that these plaintiffs asked in their suit against the trustees, children, and grandchildren of Mrs. Stewart was a judgment confirming the title to the land which she had conveyed to Mr. Kent. The living parties defendant in that action were all opposed in interest to the plaintiffs, and the grandchildren belonged to and represented the class to which the unborn persons would belong. In such a case it is safe to permit the living to represent the unborn, and the unborn must be bound by the judgment confirming the title. There is no occasion for the court to make provision in the judgment for the persons not *in esse*, as they, by the adjudication of the court, never could have any interest in the land. The general rule that no person shall be bound by an adjudication in an action to which he is in no way a party has some exceptions, and does not inexorably apply to a case where, at the time of the adjudication, persons are not *in esse* who may be affected thereby. In *Monarque v. Monarque*, 80 N. Y. 320, the parties had a vested title to the land sought to be partitioned, subject, however, to open and let in after-born children; but no notice was taken of such after-born children in the judgment, and no provision whatever was made for them, and hence it was decided that a good title could not be given to a purchaser under the sale made in pursuance of the judgment. It was held, in harmony with what I have herein stated, that a judgment and sale in partition only concludes contingent interests of persons not in being when the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests. In that case there had been an action for the construction of the will by which the land was devolved, and to that action all the persons living who were interested were made parties, and it was there decided that the provisions of the will giving interests to persons unborn were involved, and it was held in this court that adjudication could not conclude or effect the the persons not *in esse* for the reason that the action was not a proper one for the construction of the will; that the court took jurisdiction of the action only by consent, and that therefore its adjudication bound only those who consented, and could not bind persons not in being. That case did not determine that in a proper action for the construction of a will persons not *in esse* could in no case be concluded by the judgment rendered therein. That they could be concluded I have

no doubt, if the parties to the action properly brought were vested with the whole title, subject merely to the contingency that it might open and let in persons thereafter to be born. The adjudication in such a case, as well as that in the case brought by these plaintiffs against the trustees, children, and grandchildren of Mrs. Stewart, is in the nature of an adjudication *in rem*, and binds everybody.

Therefore the title tendered to the defendant was good, and so free from any reasonable doubt that it should be compelled to perform its contract and take the title.

It is also objected on behalf of the defendant that the plaintiffs were not ready and able to give a proper deed to it at the time stipulated in the second contract, to wit: within six months from the date of that contract. After the making of that contract, as the learned court found, the parties made a verbal agreement by which the defendant was to take possession of the land, and use, occupy, and enjoy the same until such time as the record title of the plaintiffs could be perfected, paying as rent therefor interest at the rate of five per cent on the purchase price. Under that agreement the defendant took possession of the land, and has continued in possession thereof, never having offered to surrender the same. These facts found by the trial court have support in the evidence, and we must take them as established and true, and they constitute in law a waiver of performance of the contract on plaintiffs' part at the time stipulated. The defendant could not retain possession of the land under the agreement, and at the same time repudiate the agreement, and refuse to take a deed tendered in pursuance thereof.

Our conclusion is that the judgment should be affirmed with costs.

All concur.

ESTATES. — REMAINDERS, WHETHER VESTED OR CONTINGENT: See note to *Goebel v. Wolf*, 10 Am. St. Rep. 470-479. For instances in which it was held that the estate in remainder would open and let in persons born after the testator's death: See *Coggins's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565; *Wadell v. Wadell*, 99 Mo. 338; 17 Am. St. Rep. 575, and note to *Rhodes v. Weddy*, 15 Am. St. Rep. 592-595.

EQUITY — RE-ESTABLISHMENT OF LOST INSTRUMENTS. — The loss of an unrecorded deed entitles the grantee to the aid of chancery to have the title vested in him, or to have the deed set up and established: *Hord v. Baugh*, 7 Humph. 576; 46 Am. Dec. 91; *Lancy v. Randlett*, 80 Mo. 169; 6 Am. St. Rep. 169; *Griffin v. Fries*, 23 Fla. 173; 11 Am. St. Rep. 351; *McCormick v. Jernejan*, 110 N. C. 406, and the decree may direct the re-execution of the

lost deed: *Bohart v. Chamberlain*, 99 Mo. 622. In most, if not all the states, the re-establishment of lost instruments is regulated by statute and jurisdiction over the subject vested in courts of law, but it has been held that such jurisdiction is strictly confined to the instruments mentioned in the statute: *St. Louis etc. R'y Co. v. Harris*, 73 Tex. 375. Since the jurisdiction of equity is not divested by a statute which gives a court of law power over the same subject, *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Shroeder v. Locher*, 75 Md. 195, equity still retains jurisdiction, where a lost instrument is to be set up, notwithstanding the courts of law exercise jurisdiction in the same case: *Fulgham v. Pate*, 77 Ga. 454; *Hall v. Wilkinson*, 35 W. Va. 167. The contents of a lost deed may be proved by parol: *Gorgas v. Hertz*, 150 Pa. St. 538. The proof should show that it was properly executed, and the evidence of its contents should be clear and certain: *Board v. Callahan*, 33 W. Va. 29; *Wakefield v. Day*, 41 Minn. 344; but circumstantial evidence will suffice: *Crain v. Huntington*, 81 Tex. 614. To entitle a party to give parol evidence of the contents of a writing he must show that a diligent but fruitless search was made at the proper place and by the proper persons: *Horse v. Fleming*, 123 Ind. 262; and the sufficiency of the search is generally left to the discretion of the trial judge: *Gorgas v. Hertz*, 150 Pa. St. 538.

JUDGMENTS, WHETHER BINDING ON PERSONS NOT PARTIES TO THE SUIT: See note to *Hill v. Bain*, 2 Am. St. Rep. 876-878. As to who are concluded by a judgment, and as to what facts, see notes to *Tallock v. Eccles*, 73 Am. Dec. 217, 218; *Sauls v. Freeman*, 12 Am. St. Rep. 199. A decree against the mother of a posthumous child is not binding upon such child where it has not been made a party to the proceeding: *Detrick v. Migatt*, 19 Ill. 146; 68 Am. Dec. 584. For a case in which it was held that an heir cannot admit away the rights of his co-heirs, see *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290. The heirs of a mortgagor are not necessary parties in a suit to foreclose the mortgage where the bill alleges that the mortgagor assigned his interest during his lifetime, and this is not controverted: *Wilkins v. Wilkins*, 4 Port. 245.

VENDOR AND PURCHASER. — Time, even when made essential, is not conclusive in equity as it is in law, but a party may show that it has ceased to be essential; and as a party may, in equity, waive any stipulation introduced into a contract for his benefit, anything which draws on the other party to execute the agreement after the default in respect to time, will amount to a waiver: *Falls v. Carpenter*, 1 Dev. & B. Eq. 237; 28 Am. Dec. 592.

MATTER OF ALBRECHT.

[136 NEW YORK, 91.]

TENANCY BY ENTIRETIES CAN EXIST ONLY where there is a conveyance of a vested interest in the title of real property.

IF A HUSBAND AND WIFE CONTRIBUTE EQUALLY from their separate estates moneys which they invest in a bond and mortgage taken in their joint names, to be held by them, their executors, administrators, or assigns, they become tenants in common thereof, and neither can take anything by right of survivorship on the death of the other.

Henry F. Sippold and James P. Niemann, for the appellants.

Henry Kropf and Gugenheimer and Untermeyer, for the respondents.

MAYNARD, J. Upon the final accounting of the executors in this case, the legatees in the will objected to the account upon the ground that it did not include the interest of the decedent in a bond and mortgage executed to him and his wife in 1878 for the payment of the sum of six thousand dollars, money loaned, which was outstanding at the time of his death, in 1886, and also at the time of the death of the wife which occurred some two months later. It was claimed by the executors that upon the death of the husband the title to the bond and mortgage, and to the money secured by it, vested wholly in the wife by virtue of her survivorship, and upon her death belonged to her estate, to be distributed to her next of kin, and that no part thereof passed under the will of the husband to the legatees named therein. The surrogate sustained this claim, and overruled the objections of the legatees, and his decision has been affirmed by the supreme court. It appeared from the evidence, and was found by the referee, that the husband and wife each invested the sum of three thousand dollars in the bond and mortgage, and the money which was loaned to the mortgagor was drawn from the savings banks, where each had deposits to his or her individual credit. Under these circumstances, we think it was a joint investment by the husband and wife, and that each had an interest in the security taken therefor to the extent of the amount contributed by him or her, and that upon the death of either such interest vested in the personal representatives of the deceased party.

There is no room here for the application of the doctrine which prevails where husband and wife take an estate in property as tenants by the entirety. That relation can only exist where there is a conveyance of a vested interest in or title to real property.

Since the adoption of the revised statutes it has been the law of this state that a mortgagee acquires no title to the mortgaged property; that the mortgage is simply a chose in action, held as collateral security for the payment of a debt, and until foreclosure the mortgagor has the entire fee subject to the lien of the mortgage. Here the bond is the principal obligation, and the rights of the joint creditors as between

themselves upon the collection of the debt are not affected by the existence of the mortgage as collateral security for its payment. It might be observed that if this was a case governed by the same principles which determine the rights of husband and wife where real property is conveyed to them during coverture, it would not necessarily follow that they would become tenants by the entirety. If nothing was shown to evince a contrary intent, such would undoubtedly be held to be the relationship of the parties, as was decided in *Bertles v. Nunan*, 92 N. Y. 155, 44 Am. Rep. 361; but this court has held in the recent case of *Miner v. Brown*, 133 N. Y. 308, that such a tenancy is not created where it appears from the character of the transaction that it was the intention of the parties that the grantees should take as joint tenants or as tenants in common. To the same effect is *Jooss v. Fey*, 129 N. Y. 17. What would be the legal rights of the parties where, upon a purchase of real property, the husband and wife had each contributed from their separate estates equally, or in any other ascertained proportion, to the payment of the consideration does not as yet seem to have been the subject of judicial decision.

It is not necessary, however, to further pursue this mode of reasoning, for it has no value, except as it may be instructive by way of analogy. The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rest upon different grounds than those which support a tenancy by the entirety. We cannot affirm the decree of the surrogate without in effect ruling that if the wife had predeceased the husband he would have taken her share of the investment by virtue of his survivorship; but under the married woman's acts, she is to be regarded as if she were sole with respect to her property rights, and she may unite with her husband in the purchase of personal property with her separate funds, and the interest which each will acquire in the subject of the purchase will not be affected by the marital relation. The law now regards them as standing upon the same plane of equality as if they were strangers to each other.

We are aware that there are many authorities holding that where the husband purchases a security or makes a deposit, or subscribes for stock in the joint name of himself and wife and pays therefor with his own funds upon his death the entire security belongs to the wife if she survives him; but the

decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift *causa mortis*, which he may revoke in his lifetime, and which does not take effect until his death if not previously recalled. While he lives his control over it is unlimited, and at his death it becomes her absolute property if she survives him, but if she does not the gift is not consummated, and the husband retains the entire title. This was the rule laid down by Lord Eldon in *Wilde v. Wilde* (Roper's Husband and Wife, Jacob's ed. vol. 1, p. 54), where it was held that if the husband purchase stock in the joint name of himself and wife it was *prima facie* a gift to her, in case of her surviving, unless evidence was produced of contemporaneous acts showing a contrary intention; but if the husband and wife each contribute to a joint investment or to the purchase of a security and the title is taken in their joint names to be held by them, their executors, administrators, or assigns, as was the bond and mortgage in the present case, no presumption can properly arise from the nature of the act that either intended to make a gift of his or her share to the survivor. The just inference is that each regarded it as a loan of individual property upon the strength of the security taken, and they become tenants in common of the bond and mortgage with all the rights and incidents of such a relationship.

We are unable to find any reported case in this state where the question has been presented in this form, but the supreme court of Michigan, held, in 1877, in the case of *Wait v. Boree*; 35 Mich. 425, that where husband and wife, being each possessed of means, had made investments jointly, each supplying half, and had taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, did not take the whole by the right of survivorship; and that the rule which prevails as to the right of survivorship in the case of united holdings of real estate by husband and wife is not applicable to personalty. This view is supported by the principles of justice which should prevail in the determination of the rights of parties, and is in accord with the spirit of modern legislation, which has striven to place the parties to the marriage contract upon the same footing with respect to the acquisition and control of their individual properties as if the conjugal relation did not exist. The decree should

be reversed, and the executors required to account for the interest of the testator in the bond and mortgage; but as the question is new, and it is apparent that the executors have acted in good faith, the costs of both parties should be paid out of the estate. All concur.

Judgment reversed.

TENANCY BY ENTIRETIES: See notes to *Den v. Hardenburgh*, 18 Am. Dec. 377-389; *Hulett v. Inlow*, 26 Am. Rep. 65-68.

HUSBAND AND WIFE—WHAT CONSTITUTES PART OF THE WIFE'S SEPARATE ESTATE. — The point raised by the circumstances of the principal case may be illustrated by the decisions regarding community property, which have established the rule that property exchanged for or purchased with the separate estate of the wife belongs to her separate estate: See cases cited in the monographic note to *Cooke v. Bremond*, 86 Am. Dec. 633, 634. Under the provisions of the constitution of North Carolina relating to the property of married women, it has been held that the title of the wife to the purchase-money of her land is not divested where the bonds and mortgages have been executed to the husband without the knowledge or consent of the wife by the mistake and ignorance of the husband: *Rodman v. Harvey*, 102 N. C. 1.

GRIGGS v. DAY.

[136 NEW YORK, 152.]

COLLATERAL SECURITIES—SURRENDER OF—LIABILITY FOR.—If a holder of collateral securities surrenders them to the makers thereof without the previous consent or subsequent ratification of his debtor, the latter does not thereupon become entitled to a credit of the face value of such securities. His credit cannot exceed their actual value, and if they are worthless he is entitled to no credit at all.

NOVATION IS A TRANSACTION WHEREBY a debtor is discharged from liability to his original creditor by contracting a new obligation in favor of a new creditor by order of the original creditor.

COLLATERAL SECURITIES.—IF A HOLDER OF COLLATERAL SECURITIES WRONGFULLY SURRENDERS them without the consent of his debtor, he makes himself liable for their conversion.

MEASURE OF DAMAGES FOR THE CONVERSION OF COLLATERAL SECURITIES by the holder thereof cannot exceed the value of the property so converted.

Melville C. Day and Esek Cowen, for the appellants.

John H. Post, for the respondent.

EARL, C. J. This action was brought against Cornelius K. Garrison, since deceased, for an accounting. It was referred to a referee and he ordered judgment in favor of the plaintiff for upwards of one hundred and eighty-eight thousand dollars.

The record is very voluminous, and in the briefs submitted and the arguments of counsel many questions of law and fact were presented for our consideration. A careful study of the record has satisfied me that the judgment appealed from is both illegal and unjust.

In September, 1879, the plaintiff entered into a contract with the Wheeling and Lake Erie Railroad Company, an Ohio corporation, for the construction and equipment of its line of railroad in that state, according to the specifications and upon the terms and conditions mentioned in the contract. By one of the provisions of the contract the railroad company was "to furnish the contractor available subscriptions or proceeds thereof and aid to the amount of four thousand dollars per mile of main track, branches and sidings, or so much as may be necessary to furnish right of way, grade, bridge, and tie said railroad between Hudson and Martins Ferry," a distance of 143 miles, and "to use its best endeavors to secure for the contractor available subscriptions and to aid to the extent of four thousand dollars per mile, or so much as may be necessary," for a similar purpose as to the balance of the road, a distance of fifty-eight miles. For the performance of this contract, besides the aid to be furnished as above stated, the plaintiff was to receive bonds and stock of the company. He was without financial ability, and he applied to Garrison for financial aid to enable him to perform his contract; and upon his application Garrison, from time to time, advanced him large sums of money, amounting in all, besides interest, to nearly \$4,500,000. For the money so advanced the plaintiff assigned and delivered to Garrison as collateral security his construction contract and bonds and stock of the company, and some of it was repaid by the sales to him of bonds and stock. In 1882 the plaintiff received from the company for extra work claimed to have been done by him, and on account of its failure to perform the portions of the contract above quoted, its promissory notes, amounting to \$1,949,710.72, and they were delivered by him to Garrison for moneys advanced and to be advanced by him for the construction of the road. Garrison held these notes until May, 1883, when there was due to him for moneys advanced to the plaintiff for the construction of the road nearly two million five hundred thousand dollars. He then received from the company 2,280 of its second-mortgage bonds of the denomination of one thousand dollars, at seventy-five cents on the dollar, amounting, with some interest, to \$1,736,600, to

apply upon his claims, and he then surrendered to it all of the above-mentioned promissory notes, and they were canceled. On the same day he caused an original entry to be made in his journal, one of his account-books, as follows: "This amount of notes and interest, \$2,062,643.13, taken from contractor at 75 per cent, \$1,546,982.35." He then charged the company in his books of account with the whole amount of the notes and interest, and gave it credit for \$1,736,600, the price, including interest, at which he took the second-mortgage bonds, and he credited the plaintiff with the sum of \$1,546,982.35. The difference between the total amount due upon the notes and the amount allowed by him for the second-mortgage bonds was \$326,043.13; and thus he had in his hands not used for the payment of the bonds the notes to that amount, which he then surrendered to the company without any consideration whatever; and, as the referee found, he elected to look to the company as his debtor on open account for that amount. The referee also found that by reason of the surrender of the notes in consideration of the purchase of the bonds, and by reason of the surrender of the balance of the notes, and by reason of the election before mentioned, Garrison discharged the indebtedness of the plaintiff to him to the amount of the face value of the notes at the time of the surrender. He also found that the plaintiff's rights as pledgor in the construction contract and in the bonds, stock, and other property transferred to Garrison as collateral security were never cut off by foreclosure of his rights, or in any other way.

These facts having been found by the referee, he found, among other conclusions of law, that the legal effect of the surrender by Garrison to the railroad company of the promissory notes held by him as collateral security for moneys advanced to the plaintiff, and of the charge by him against the railroad company of the full amount of the notes and interest, was to relieve the plaintiff from any liability to him for the amount thereof; and in the accounting he charged Garrison with the full amount of the notes, with interest. The only question which I deem it important now to consider, is whether the learned referee was right in making that charge.

The further fact must be taken into consideration that the notes surrendered were of no value as against the company. It was utterly insolvent, with property no more than sufficient to pay its first mortgage bonds. The second mortgage

bonds were absolutely of no intrinsic value. The referee held these facts to be immaterial, and that under the circumstances, Garrison had made himself chargeable with the full amount of the notes, without reference to their value. Such a conclusion is somewhat startling, and should not be sanctioned, unless it has support in well recognized principles of law, or authorities which we feel constrained to follow.

The entries in Garrison's books of account in reference to these notes, have very little bearing upon the controversy between these parties. They were private entries made by Garrison, undisclosed to the plaintiff, and without his authority. They were important simply as evidence, and are entitled to no more weight than would have been the oral declarations or admissions of Garrison made to any third party. They show what use he made of the notes, and about that there is no dispute. They did not bind the plaintiff, and he has never, so far as appears, assented to them. They show that Garrison intended to take the notes at seventy-five cents on the dollar, and that he was willing to allow the plaintiff that sum for them; but there was no actual purchase of them. If that entry had come to the knowledge of the plaintiff, and he had adopted it, and so notified Garrison, he could probably have held him to a purchase of the notes for that sum; but he repudiates that entry, and refuses to let Garrison have the notes for that sum. He cannot use that entry to fasten upon him a purchase of the notes at their face value. The minds of the parties never met upon such a contract. Garrison either purchased the notes used in exchange for the bonds at seventy-five per cent of their face value, or he did not purchase them at all. Therefore, as the plaintiff repudiates the purchase at the price named, there was no contract of purchase, and as to these notes, pledged for collateral security, Garrison must be held to have wrongfully converted them to his own use. It would make no difference whether we consider these notes as having been exchanged for the bonds, or as having been used in payment for the bonds. In either view Garrison was at most guilty of a conversion of them.

As to the balance of the notes which were surrendered to the company without any consideration, there was simply a wrongful conversion of them. They had no value as obligations against the company and it is preposterous to suppose that Garrison intended, by the surrender, to charge himself

for their full face value against an indebtedness of the plaintiff to him for money actually loaned. By the surrender he did not intend to release the company from its indebtedness evidenced by the notes; but he intended and elected still to hold the indebtedness evidenced by his charge in open account upon his books. The obligation of the company was not impaired or lessened by the transaction, and it owed just as much after it as before. Even if he made the notes his own by surrendering them, there was simply a conversion of them. It is true that he elected to hold the company as his debtor upon open account, just as it was his debtor before for the same amount evidenced by the notes. He did not take a new debtor, but he retained, and intended to retain, the same debtor. Here there was no novation, and nothing resembling it. It usually, if not always, takes three parties to make a novation, and they must all concur upon sufficient consideration in making a new contract to take the place of another contract, and in substituting a new debtor in the place of another debtor. Novation is thus briefly defined: A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor: 1 Parsons on Contracts, 217. Here there was no element answering to this definition. There was no intention to make a novation, no consideration for a new contract, no concurrence of the three or even of the two parties.

So we reach the conclusion, as to all the notes, that Garrison, by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong; and the question is, what were such damages? The answer must be, the value of the notes converted. There can be no other measure, as that measures the entire damage of the plaintiff absolutely.

As to the notes surrendered for the bonds, the plaintiff could have elected to take the bonds or their value, but this he refuses to do, as the bonds have no value, and thus he is confined absolutely to the value of the notes.

Now how does the case stand upon authority? In *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294, the plaintiff deposited with the defendant a promissory note of a third person as collateral security for a debt, and the defendant without the knowledge or consent of the plaintiff compromised with

the maker of the note and surrendered the note to him upon payment of one half of the face thereof. It was found that the maker was at the time of the compromise abundantly able to pay the full amount of the note; and under such circumstances it was properly held that the pledgee was liable for the balance unpaid upon the note. In *Hawks v. Hinchcliff*, 17 Barb. 492, the plaintiff sued the defendant upon an account for merchandise delivered, and the defendant showed that the plaintiff took two notes for the amount of the account as collateral security for the payment thereof; that he transferred one of the notes to a person who recovered judgment thereon against the makers, and afterward assigned the judgment to one Prindle; that he recovered judgment upon the other note and assigned that to Prindle; and it appeared that the defendants in those judgments had never paid the notes or the judgments. It was held that the plaintiff, the pledgee, could not recover upon his account. It was not shown upon what consideration the notes and the judgments were transferred by the pledgee, or that at the time of the transfer the makers of the notes were not perfectly solvent. The plaintiff there relied upon the simple fact that the notes and judgments were not paid. Upon this state of the facts the court held that the presumption, nothing appearing to the contrary, was that the note and judgments were transferred by the plaintiff for the full amount appearing to be due upon them, and hence he was charged with the full amount. There are some broad expressions contained in the opinion which when isolated from the facts of the case tend to give some countenance to the plaintiff's contention here. In *Vose v. Florida R. R. Co.*, 50 N. Y. 369, it was held that a wrongful sale by a creditor of collateral securities placed in his hands by the principal debtor, does not *per se*, discharge even a surety for the debt (much less the principal debtor), *in toto*, but that by such sale the creditor makes the securities his own to the extent of discharging the surety only to an amount equal to their actual value. In *Potter v. Merchants' Bank*, 28 N. Y. 641; 86 Am. Dec. 273; *Booth v. Powers*, 56 N. Y. 22; and *Thayer v. Manley*, 73 N. Y. 305, it was held that in an action to recover damages for the conversion of a promissory note, the amount appearing to be unpaid thereon at the time of the conversion with interest, is *prima facie* the measure of damages, but that the defendant has the right to show in reduction of dam-

ages the insolvency or inability of the maker, or any other fact impugning the value of the note.

In the *Exeter Bank v. Gordon*, 8 N. II. 66, where the bank had received a note as collateral security and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon compromise upon proof that the compromise was advantageous and that the maker was insolvent and unable to pay the balance, and the general rule was laid down which was announced in the cases last above cited.

If the pledgee of the note of an insolvent maker may surrender it upon a compromise for one dollar without being made liable for more than he receives, upon what conceivable principle can a pledgee be held for the face value of a worthless note by surrendering it without any consideration whatever? If one intrusted with a note as agent, or holding it as pledgee, loses it by his carelessness, or even willfully destroys it, he can, in an action against him by the principal or pledgor, be held liable only for the value of the note. If Garrison had broken into the plaintiff's safe and taken these notes without any right whatever, in an action for their conversion the plaintiff could have recovered against him as damages only the actual, not the face value of the notes.

I need go no further. Other illustrations are not needed. Our attention has been called to no case in law or equity which upholds the plaintiff's contention as to these notes. I should be greatly surprised to find any and do not believe there are any.

I have assumed, without a careful examination of the defendants' objections to the notes, that they were valid and properly issued by the company for their full amount. I have also assumed without examining the matter that upon this record we must hold against the contention of the defendants that the second mortgage bonds took the place of the notes given for them and were held in their stead as collateral security.

Statements made upon the argument by the counsel for the appellants rendered it unnecessary for us to consider any other objections to the judgment, and for the reasons stated the judgment should be reversed and a new trial granted, costs to abide the event.

All concur; GRAY, J., in result.

DEBTOR AND CREDITOR. — NOVATION, DEFINITION OF: See note to *Hobson v. Davidson's Syndic*, 13 Am. Dec. 294. To entitle the creditor to recover against the substituted debtor, it must appear that the creditor assented to the arrangement, and that the original debt was extinguished: *Butterfield v. Hartshorn*, 7 N. H. 345; 26 Am. Dec. 741; *Bouvier v. Negrete*, 16 La. 474; 35 Am. Dec. 217. Whether a transaction amounts to a novation is a question of intention, to be decided from all the circumstances of the case: *Fidelity Ins. etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858. For cases in which there was held to be a novation, see *Heaton v. Angier*, 7 N. H. 397; 28 Am. Dec. 353; *Sterling v. Ryan*, 72 Wis. 36; 7 Am. St. Rep. 818.

Collateral Securities.

Definition. — "The use of the term 'collateral security,' when the debtor transfers to his creditor an article of value or an evidence of debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the the principal which it is given to secure. It is subsidiary to the principal debt; running parallel with it, collateral to it; and when collected is to go to the credit of the principal debt, or if the principal debt be paid off, the debtor is entitled to the restoration of the collateral security": *Munn v. McDonald*, 10 Watts, 270, 273; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120, 127. Though perhaps it is true, as indicated in the definition just quoted, that every transfer of an article of value for the purpose of securing the payment of an obligation due to the transferee may entitle such article to be called a collateral security, yet the term as generally used, and as used in this note, is much more limited in its signification.

The Usual Subjects of Transfer as Collateral Securities are choses in action, whether negotiable or not, certificates of stock in private corporations, bills of lading, and warehouse receipts. These, even when not in all respects negotiable, are transferrable by indorsement and delivery, and when indorsed and delivered vest in the indorsee all the rights in the property possessed by the transferer, so far at least as may be necessary to accomplish the purposes of the transfer, and constitute the most convenient as well as the most usual form of collateral security: *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Douglas v. People's Bank*, 86 Ky. 176; 9 Am. St. Rep. 276. Our inquiries will therefore be limited to collateral securities belonging to the classes just mentioned.

The Means by Which a Security may be Made Collateral to the satisfaction of an obligation will not be considered here for want of adequate time and space. We shall assume in what we shall hereafter state that the alleged collateral security in question has been indorsed and delivered, or otherwise transferred as completely as it was possible for the holder or transferer to transfer it, and shall then proceed to inquire what are the rights, duties, liabilities, and remedies of the transferee thereof.

The Title of the Holder. — In considering the rights of the holder of collateral securities we shall treat: 1. Of his title, for the purpose of showing to what extent it is subject to attack; 2. What he may lawfully do by virtue of his qualified ownership; and 3. Of the purposes for which he may hold the property or to which he may apply its proceeds. It may be that the person who transferred the security as collateral did not have the title thereto, or having title held it in trust, or for some special purpose not admitted by the

to transfer it as he did. If such be the case, the validity of his transfer as collateral security must be determined by the rules applicable to absolute transfers. If the title to the property was so apparently vested in him that he had transferred it to an absolute purchaser in good faith such transfer must have been sustained, then also must the transfer as collateral security be upheld. Hence, if a holder of securities payable to bearer, or otherwise transferable by mere delivery, or of securities transferable by indorsement to whom they have been indorsed, transfers them as collateral security to a person acting in good faith, such transfer must be held good, though the person making it had no title to the property whatever, or held it as a bailee merely, or in trust for some special purpose: *Beulle v. Southern Bank*, 57 Ga. 274; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; *Coit v. Humbert*, 5 Cal. 260; 63 Am. Dec. 128; *Gottberg v. United States Nat. Bank*, 131 N. Y. 595; *Ambrose v. Evans*, 66 Cal. 74; *Arnold v. Johnson*, 66 Cal. 402; *Texas Banking etc. Co. v. Turnley*, 61 Tex. 365; *Wood's Appeal*, 92 Pa. St. 379; 37 Am. Rep. 694; *Burton's Appeal*, 93 Pa. St. 214. On the other hand, if the circumstances were such as to put the purchaser upon inquiry or charge him with notice of the true title of the owner, then they are potent to the same extent as against a transferee for collateral security: *Leiper's Appeal*, 108 Pa. St. 377. So if a paper was non-negotiable or dishonored, a transferee for collateral security cannot enforce it under circumstances precluding its enforcement by an absolute purchaser: *Jenness v. Bean*, 10 N. H. 266; 34 Am. Dec. 152; *In re Sime*, 3 Saw. 305. If acts are required in order to protect an absolute purchaser against the claims of creditors or others, they are equally necessary for the protection of a transferee as collateral security, and his rights may be lost through his non-observance of those acts: *Atkinson v. Foster*, 134 Ill. 472.

Holder is Ranked as a Purchaser. — The holder of collateral security is, at least to the extent to which he has a right to its proceeds, to be regarded as a purchaser entitled to the same immunity against secret equities and unknown defenses as a purchaser would be, who acquired absolute title to the property under like circumstances. Therefore, if he acquires a note or other security in good faith and for value, before its maturity, no defense can be asserted against him arising out of want of consideration: *Stoddard v. Kimball*, 6 Cush. 469; *Pitts v. Foglesong*, 37 Ohio St. 676; 41 Am. Rep. 540; *Fisher v. Fisher*, 93 Mass. 303; or out of any other matter or equity of which he had no notice when he acquired the security: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341; *Chicopee Bank v. Chapin*, 8 Met. 40; *Lehman v. Tallahassee M. Co.*, 64 Ala. 567; *Stotts v. Byers*, 17 Iowa, 303; *State Sav. Inst. v. Hunt*, 17 Kan. 532; *Logan v. Smith*, 62 Mo. 455; *New Orleans Banking Assn. v. Wilz*, 4 Wood, 43; *Kisterbock's Appeal*, 127 Pa. St. 601; 14 Am. St. Rep. 868. The title of the holder of a collateral security is, on the other hand, no better than if he were an absolute purchaser, and he is affected with notice of any conditions or infirmities attached to the paper to the same extent that an absolute purchaser would be, and hence he must take notice of by-laws printed upon certificates of stock transferred to him as collateral: *State Saving Assn. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642.

Taken to Secure Pre-existing Debt. — Whether one who acquires property in payment of a pre-existing indebtedness should be treated and protected as a purchaser thereof in good faith and for value, so as to protect him against defects in his title of which he had no notice, and against secret defenses and equities, is a question which has been much discussed and over which great diversity of judicial opinion still exists. On the one side it is claimed that

only when some new consideration is advanced on the faith of a transfer, can the transferee properly be deemed a purchaser, and therefore if he merely accepts property in payment of his pre-existing obligation, he is not entitled to the same consideration as if he had paid out moneys at the time of the transfer. The leading case maintaining this view is *Bay v. Coddington*, 5 Johns. Ch. 54; 9 Am. Dec. 268, which has been followed by many subsequent decisions in the same state and in others: *Stolker v. McDonald*, 6 Hill, 93; 40 Am. Dec. 389; *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142; *Lawrence v. Clark*, 36 N. Y. 128; *Wearer v. Barden*, 49 N. Y. 286; *Bramhall v. Beckett*, 31 Me. 205; *Bowman v. Van Kuren*, 29 Wis. 269; 9 Am. Rep. 554; *Royer v. Keystone Bank*, 83 Pa. St. 248; *Fenouilli v. Hamilton*, 35 Ala. 319; *Lee's Adm'r v. Sneed*, 1 Met. (Ky.) 628; 71 Am. Dec. 494; *Prentice v. Zane*, 2 Gratt. 262; *First Nat. Bank v. Strauss*, 66 Miss. 479; 14 Am. St. Rep. 579; *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17. It did not, however, meet with the approval of the supreme court of the United States, and is, in our judgment, now in conflict with the decided weight of authority upon the subject: *Swift v. Tyson*, 16 Pet. 1; *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; *Maitland v. Citizen's Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Mix v. National Bank*, 91 Ill. 20; 33 Am. Rep. 44; *Herman v. Gunter*, 83 Tex. 66; 29 Am. St. Rep. 632; *Tabor v. Merchant's Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375. A corresponding difference of opinion has arisen with respect to collateral securities when the debt secured by them was not created in reliance upon them, but was a pre-existing debt. There are authorities which hold that when the collateral is taken to secure such pre-existing debt, the holder is not entitled to protection as a holder *bona fide*, and that there may be asserted against him all defenses existing against the transferor at the time the transfer was made: *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464; *Ruddick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Dupont v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216; *Cutlum v. Branch Bank*, 4 Ala. 21; 37 Am. Dec. 725; *Richardson v. Rice*, 9 Baxt. 290; 40 Am. Rep. 92; *Craighead v. Wells*, 8 Baxt. 38; 35 Am. Rep. 685; *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342; but these decisions are also contrary to the weight of authority upon the subject, and the holder of a collateral security taken to secure a pre-existing debt is now generally entitled to be treated as a purchaser to the same extent as if the taking of the security had been coincident with the creation of the debt it was given to secure: *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; *Smith v. Jennings*, 74 Ga. 551; *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; 24 Am. St. Rep. 189; *Atkinson v. Brooks*, 26 Vt. 539; 62 Am. Dec. 592; *Pitts v. Eaglesap*, 37 Ohio St. 676; 41 Am. Rep. 540; *Railroad Co. v. National Bank*, 102 U. S. 14; *Fair v. Howard*, 6 Nev. 310; *Spencer v. Sloan*, 108 Ind. 183; 13 Am. Rep. 35; *Straughan v. Fairchild*, 80 Ind. 598; *Citizens' Bank v. Payne*, 18 La. Ann. 222; 89 Am. Dec. 650; *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250; *Fisher v. Fisher*, 98 Mass. 303; *Albire v. Hartshorne*, 21 N. J. L. 655; 47 Am. Dec. 175; *Bank of Republic v. Carrington*, 5 R. I. 515; 73 Am. Dec. 83; *Payne v. Bensley*, 8 Cal. 260; 68 Am. Dec. 318. Even in those states in which one taking a collateral for an antecedent debt is not protected as a purchaser for value, there is, to some extent, an exception in the case of accommodation paper, for the maker of such paper cannot, as against one to whom it has been transferred as collateral security, successfully resist its enforcement because of its want of consideration. "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequences:

Walker v. Bank of Montgomery, 12 Serg. & R. 382; and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way": *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Kimbro v. Lytle*, 10 Yerg. 417; 31 Am. Dec. 585; *Appleton v. Donaldson*, 3 Pa. St. 381; note to *Altoona S. Nat. Bank v. Dunn*, 31 Am. St. Rep. 747, 748. He may, however, in those states interpose as against such paper every defense except want of consideration: *Cummings v. Boyd*, 83 Pa. St. 372; *Carpenter v. National Bank*, 106 Pa. St. 170; as that the note was given subject to the restriction that it should be used for a specified purpose only, which purpose did not include the right to pledge it except for a subsequent loan: *Altoona S. Nat. Bank v. Dunn*, 151 Pa. St. 228; 31 Am. St. Rep. 742.

Rights of Holder are Restricted to his Interests. — A holder of collateral security is in no instance entitled to be protected as a purchaser thereof except in so far as may be necessary to enforce payment of the obligation to secure which it was given. If the title of the transferor was imperfect or fraudulent and his transfer was in derogation of the title or interest of some other person, the latter, though he may be required to recognize the transfer and permit it to stand for the purpose for which it was given, may, in all other respects, assert his rights and compel payment to himself of any surplus remaining after the satisfaction of the obligation for which his property stood as collateral security: *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Kellogg v. Thompson*, 142 Mass. 76; *In re Bonner*, 8 Daly, 75. So where the maker has a defense as against the original payee of a negotiable instrument transferred as collateral security, the holder is in no event entitled to enforce such instrument, except to the amount of the debt which it was pledged to secure, as where the instrument was an accommodation paper: *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; 11 Am. Rep. 219; *Chicopee Bank v. Chapin*, 8 Met. 40; *Farwell v. Importers' Nat. Bank*, 90 N. Y. 453; *Stoddard v. Kimball*, 6 Cush. 469; or defenses, *Farmers' etc. Bank v. Blevins*, 46 Kan. 536, or offsets, *Second Nat. Bank v. Hemingway*, 34 Ohio St. 381, exist in favor of the maker.

The Rights of the Holder of a Collateral Security must necessarily be commensurate with his title. In other words, he must be allowed to possess, enforce, and enjoy the security and the profits and accumulations thereof, so far as may be necessary to the discharge of his debt. "A bond or chose which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it": *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120. "A creditor who holds collateral security for the protection of his debt stands in a different relation to the assignor of the collateral, though the latter be his debtor. By the assignment a privity is created or established which invests the assignee with the ownership of the collateral for all purposes of dominion over the debt assigned. He is alone empowered to receive the money to be paid upon it and to control it in order to protect his right under the assignment." *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. The assignor, therefore, loses all control over the paper, his dominion, if not entirely and finally extinguished, is at least suspended until by the payment of the obligation the title and rights of the holder of the collateral are terminated; and therefore, the assignor, if the collateral be a note or other instrument for the payment of money, has no power to forbid or excuse such payment nor to attach conditions thereto: *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180; and no payments made to him can discharge the obligation to the prejudice of one holding it as collateral security: *Blake v. Buchanan*, 22 Vt. 548.

Rights of Holder of Stocks.—If the property held as collateral security consists of the stock of a corporation, the holder is, for the time being, entitled to all the rights and privileges of a stockholder. His right to any dividends which may be declared is paramount to that of his pledgor, and he may recover them of the corporation if they remain unpaid, or of the pledgor if they have been wrongfully received by him: *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Gaty v. Holliday*, 8 Mo. App. 118; *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412, 416. There is certainly a want of harmony in the views expressed by text writers and in some of the decisions respecting the right of the holder of stock for collateral security to vote it at those elections of the corporation in which its stockholders are entitled to participate. Sometimes it is said that the pledgee has no right to vote, although the stock stands in his name on the books of the corporation, and at other times the view has been expressed that equity may, at the instance of the pledgor, compel the re-assignment of the stock to him for the purpose of voting, or may otherwise prevent its being used or voted to his injury by the pledgee. We doubt the correctness of either of these views. The title or interest of the holder of stock for collateral security is certainly paramount to that of the pledgor thereof. Therefore, there is no reason why the latter, rather than the former, should be permitted to participate in corporate elections. At all events, we think it well settled now that if the stock, though in fact held as security, has been so transferred upon the books of the corporation that its holder as collateral there appears to be the owner thereof, he has the same right to vote as if his ownership were absolute instead of conditional or qualified: *Hoppin v. Buffum*, 9 R. I. 515; 11 Am. Rep. 291; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594; *Vail v. Hamilton*, 85 N. Y. 453; and it may be said generally that the holder of stock as collateral security has the same rights as an absolute owner thereof, including the right to protect it from waste and diminution: *Baldwin v. Canfield*, 26 Minn. 43; to hold it free from all liens and claims of the corporation not assertable against it were he its absolute owner: *New Orleans etc. Co. v. Wiltz*, 10 Fed. Rep. 330; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; and also against the claims of all creditors of the pledgor, whether by attachment or otherwise, whose liens do not antedate the transfer to him: *Merchants' etc. Bank v. Richards*, 6 Mo. App. 454; 74 Mo. 77; *Moore v. Bank*, 52 Mo. 379; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369; *Nabring v. Bank of Mobile*, 58 Ala. 204; *Broadway Bank v. McElreath*, 13 N. J. Eq. 24; *Early's Appeal*, 89 Pa. St. 411; *Ehly v. Guest*, 94 Pa. St. 160; *Fraser v. Charleston*, 11 S. C. 487-519; *Cornick v. Richards*, 3 Lea, 1; *Beckwith v. Burrough*, 13 R. I. 294; *Cheever v. Meyer*, 52 Vt. 66; *Coll v. Ives*, 31 Conn. 25; 81 Am. Dec. 161. These rules are equally applicable to the transfer of warehouse receipts or of bills of lading as collateral security. The transferee becomes to the extent of his debt the owner of the property represented by such receipt or bill, and entitled to protect and vindicate his rights in the same manner and to the same extent as if the transfer to him were absolute: *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 617; *Cartwright v. Wilmerding*, 24 N. Y. 521; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399, 411; *Fourth Nat. Bank v. St. Louis Cotton Co.*, 11 Mo. App. 333, 341; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104; *Whitney v. Tibbits*, 17 Wis. 359; *Gibson v. Stevens*, 8 How. 384; *First Nat. Bank v. Bates*, 1 Fed. Rep. 702.

The Creditors of the Pledgor have no legal right to object to the pledge where the circumstances attending it are not such as to make it fraudulent as

against them if it were an absolute transfer: *Lane v. Sleeper*, 18 N. H. 209; nor after it is made, have they any right to insist upon its retention by the pledgee. He may, therefore, if he sees proper, return it to his debtor, relinquishing all rights thereunder and electing to proceed upon the principal obligation alone, without giving the other creditors any just cause of complaint or interference: *In re Dyott*, 2 Watts & S. 463.

As the pledgee has the right to retain possession of the property pledged until his debt is paid, such possession should certainly be deemed to be held in subordination to the rights of the pledgor, and perhaps it is impossible for it to be adverse so as to confer upon the pledgee any prescriptive title to it, as against the pledgor or his successors in interest: *Cross v. Eureka etc. Canal Co.*, 73 Cal. 302; 2 Am. St. Rep. 808. There is, however, no objection to the pledgee's acquiring the title of the pledgor in any manner not inconsistent with the pledge, and therefore the former may purchase and acquire the title of the latter at an execution sale: *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 230.

Where a collateral security is in the hands of a creditor, the right to prosecute an action upon his original debt may terminate through the operation of the statute of limitations. Two strange and equally incorrect views respecting his rights have been expressed, one being that his right to the collateral security thereupon becomes absolute, and that he is exonerated from accounting to his debtor for it or its proceeds, and the other, that he loses all right to it, and can no longer enforce it for any purpose whatever: *Russell v. La Rouge* 13 Ala. 149; *Van Eaton, v. Napier*, 63 Miss. 220. In one state, on the other hand, the continued existence of the collateral security has been held to suspend the running of the statute of limitations and to prevent its operating against the maintenance of any action on the original debt: *Blanc v. Hertzog*, 23 La. Ann. 199; *Police Jury v. Duralde*, 22 La. Ann. 107; *Citizen's Bank v. Knapp*, 22 La. Ann. 117. But assuming the statute to run against the original debt, this certainly has no effect on the collateral. The operation of this statute, in the absence of any statute giving it a different effect, is merely to destroy the remedy without affecting the right. It does not cancel the debt nor bar any proceeding other than the action, the right to maintain which has been lost by the statute: *Belknap v. Gleason*, 11 Conn. 160; 27 Am. Dec. 721; *Ludlow v. Van Camp*, 7 N. J. L. 113; 11 Am. Dec. 529; *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22; 72 Am. Dec. 770. Therefore, if the creditor held the collateral security before the statutory bar against the original debt was perfected, he may continue to hold it afterwards, and may bring any appropriate action thereon as long as such collateral itself is not barred; and has the right to apply the proceeds of such action, or of any proper disposition he may make of his collateral, to the satisfaction of the original debt: *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Choteau v. Allen*, 70 Mo. 290, 341; *Roots v. Mason City etc. Co.*, 27 W. Va. 483.

Purpose for which Collateral May be Held. — We have already had occasion to state incidentally that the title and rights of the holder of collateral securities were restricted to the principal debt. It follows from this that when such debt is paid the pledgor of the collateral security becomes entitled to it, or so much of it as remains after such payment. Whenever the collateral was given for any specific purpose, the holder has no right to retain it, or any of its proceeds, after that purpose has been accomplished. Though the pledgor may be indebted to the holder of the security upon other obligations, the latter has no right to retain it or its proceeds for the

purpose of securing or satisfying such other liabilities: *Phillips v. Thompson*, 2 Johns. Ch. 418; 7 Am. Dec. 535; *Masonic Savings Bank v. Bangs*, 84 Ky. 135; 4 Am. St. Rep. 197; *Schiffer v. Feagin*, 51 Ala. 335; *Teutonia Nat. Bank v. Loeb*, 27 La. Ann. 110; *Talmage v. Third Nat. Bank*, 91 N. Y. 531; *Wyckoff v. Anthony*, 9 Daly, 417; *Duncan v. Brennan*, 83 N. Y. 487; *Lloyd v. Lynchburg Nat. Bank*, 86 Va. 690; *San Antonio Nat. Bank v. Blocker*, 77 Tex. 73. If the purpose for which the collateral security was given is expressed in writing, such writing is not subject to be varied or contradicted by parol evidence for the purpose of showing that the collateral may be held to secure some other indebtedness not mentioned in the writing: *Hurdie v. Wright*, 83 Tex. 345; *Roosevelt v. Mark*, 6 Johns. Ch. 266. If the purpose of giving the security does not clearly appear but there is no doubt that but one indebtedness existed against the pledgor and in favor of the pledgee at the time the security was given, it will be presumed to have been made for the purpose of securing that indebtedness only, and its application to subsequently accruing indebtedness will not be permitted without the assent of the pledgor: *Buckley v. Garrett*, 60 Pa. St. 333; 100 Am. Dec. 564.

The rule that a collateral security can be held or applied only upon the obligation which it was given to secure does not prevent its retention for and application to the satisfaction of that obligation in any changed form. Thus though the principal debt is prosecuted to, and merged in, a judgment, the right to hold the security is not lost. It may be held for and applied to the satisfaction of the judgment: *Smith v. Strout*, 63 Me. 205; *Charles v. Coker*, 2 S. C. 122; *King v. Hutchins*, 28 N. H. 561; *Fisher v. Fisher*, 98 Mass. 303. The renewal of a note is not as between the parties presumed to discharge or satisfy the pre-existing debt but merely to extend the time for its payment. It is at most a change in the evidence of the debt and not in the debt itself. Therefore every collateral security given for the original evidence of the debt stands equally good for the new evidence. Hence such collateral may be held for the satisfaction of a note given as a mere renewal of a pre-existing note for the payment of which such collateral was originally pledged: *Shrewsbury Savings Institution's Appeal*, 94 Pa. St. 309; *Merchants' Bank v. Hall*, 83 N. Y. 338; 38 Am. Rep. 434; *Collins v. Dawley*, 4 Col. 138; 34 Am. Rep. 72; *Pinney v. Kinton*, 46 Vt. 83; *Williams v. National Bank*, 72 Md. 441; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Lancaster Nat. Bank's Appeal*, 122 Pa. St. 31. If, however, the collateral security does not belong to the maker of the principal debt, and its owner stands therefore in the position of a guarantor rather than in that of a principal debtor, then there is no presumed power of the debtor to extend the time of payment or to give renewals which will bind his guarantor, and the collateral security given by the latter cannot be held for a renewal given without his assent: *Burnap v. Potsdam Bank*, 96 N. Y. 125; *Talmage v. Third Nat. Bank*, 91 N. Y. 531.

What we have said about the right of the holder of a collateral security being limited to the obligation to secure which it was taken should not be understood as implying that it may not be given as security for several obligations or for all obligations existing, or to exist in the future, against the pledgor and in favor of the pledgee. The terms of the agreement under which the collateral is taken may authorize it to be held for the satisfaction of all debts which may accrue against the pledgor, and if so, it may be applied to the satisfaction of any debt upon which he at any time becomes liable to the pledgee, whether as an individual: *Moors v. Washburn*, 147 Mass. 344; *Eichelberger v. Murdock*, 10 Md. 373; 69 Am. Dec. 140; or as

a member of a partnership: *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359.

Duties of Holder of Collateral. — As the holder of collateral security is entitled to its possession and to the extent of his interest is substantially the owner thereof, he must, to a certain extent at least, assume the duties of ownership, and furthermore must protect the interests of his pledgor as well as his own, because the latter, by giving the collateral security, has parted with the power to protect himself. "The contract carries with it the implication that the security shall be made available to discharge the obligation": *Wheeler v. Newbould*, 16 N. Y. 396. We apprehend that it carries with it the further implication that the property, no matter what its character, shall not be lost through the negligence or inattention of the pledgee. The duty of a pledgee to his pledgor has been called into question with respect to choses in action more frequently than to any other form of collateral security. In a case arising in Minnesota it appeared that one to whom a note had been transferred as collateral security failed to take any measures for its collection, though requested to do so by the pledgor, who also offered to indemnify the pledgee for the costs of proceeding to such collection, and that through the inaction of the pledgee the debt had been lost. In discussing the law applicable to this subject, the court said: "In this case there is no express agreement with reference to the pledge; the rights and obligations of the parties, therefore, are such only as arise from the indorsement and delivery of a negotiable promissory note of a third person by the principal debtor as security for his debt. No question as to the rights or obligations of a surety is involved, the question presented being between the immediate parties to the contract, — the principal debtor as pledgor, and the creditor as pledgee. So far as the authorities upon this subject are concerned, there is no doubt that the pledgee of negotiable paper as collateral security is bound to ordinary diligence in preserving the legal validity of the pledge, and answerable for a loss through a corresponding degree of negligence to the extent of such loss: 2 Parsons on Contracts, 5th ed., 511; *Jennison v. Parker*, 7 Mich. 355; and we think, as between the principal debtor and the creditor in a pledge of a similar character of negotiable promissory notes, for the payment of which third parties are responsible, the authorities both in England and in this country impose upon the pledgee ordinary diligence to preserve the pecuniary value of the pledge, requiring, when necessary, active measures to prevent a loss by the insolvency of third parties who are liable for their payment: *Ex parte More*, 2 Cox, 63; *Williams v. Price*, 2 Sim. & St. 582; Parsons on Contracts, 5th ed., 110, note citing *Noland v. Clark*, 10 B. Mon. 239; *Beale v. Farmers' etc. Bank*, 5 Watts, 529; 3 Lead. Cas. Eq., 3d Am. ed. 552, 556; *Lyon v. Huntingdon Bank*, 12 Serg. & R. 61. The same doctrine is recognized in *Bank of United States v. Peabody*, 20 Pa. St. 457; *Bitner v. Brough*, 11 Pa. St. 127"; *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301. So where it was alleged that the holder of a judgment as collateral failed to renew it and allowed the lien thereof to expire, and the debt to be lost through his supineness, the court said, "Where a debtor assigns a judgment as collateral security to his creditor, he parts with his authority over it, and the assignee has the right and power to let the lien die or keep it alive, and must abide the consequences of his own will or negligence: *Collingwood v. Irwin*, 3 Watts, 306. The debtor is entitled to a credit for a loss upon a judgment assigned as collateral to his creditor, when the loss is occasioned by the supine negligence of the assignee: *Beale v. Farmers' etc. Bank*, 5 Watts, 529. A bond or chose

which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it. His duties in respect to it are active. He is to employ reasonable diligence in collecting the money on the security and applying it to the principal debt, and a conversion of it into a less security is such misuse as makes him accountable to the debtor: *Muirhead v. Kirkpatrick*, 21 Pa. St. 237. A creditor who holds a collateral security for his debt stands in a different relation to the assignor from that of a creditor to the surety for his debtor. By the contract the assignee is invested with the ownership of the collateral for all purposes of dominion over it. When the collateral is lost by the supine negligence of the assignee, he must account for the loss to his own debtor: *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. The plaintiff parted with all his right of control over the collaterals, and the appellant was bound to employ reasonable diligence in their collection": *McQueen's Appeal*, 104 Pa. St. 595; 49 Am. Rep. 592.

If the collateral security is a negotiable instrument, and measures are necessary to charge any party thereon, then there is no doubt that the holder of such security owes to the pledgor the duty of taking the measures necessary to preserve the liability of all the parties to the instrument: *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20; *Pickens v. Yarborough*, 26 Ala. 417; 62 Am. Dec. 728; *May v. Sharp*, 49 Ala. 140; *Douglass v. Mundine*, 57 Tex. 344; *Lee v. Baldwin*, 10 Ga. 208; *Barrow v. Rhinelander*, 3 Johns. Ch. 614. If a demand for payment and notice of dishonor are required to charge any party to the instrument, and the holder neglects to make such demand or to give such notice, whereby the debt is lost, he is liable to the pledgor for the damages resulting to him: Note to *Miller v. Gettysburg Bank*, 34 Am. Dec. 451, 452; *Peacock v. Pursell*, 14 Com. B., N. S., 728; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20; *Butterton v. Roope*, 3 Lea, 215; 31 Am. Rep. 633; *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; *Jennison v. Parker*, 7 Mich. 355; *Kennedy v. Rosier*, 71 Iowa, 671; *Whitten v. Wright*, 34 Mich. 92; *Pickens v. Yarborough*, 26 Ala. 417; 62 Am. Dec. 728; *Russell v. Hester*, 10 Ala. 535. Where it is apparent that the omission to do an act must release a party liable on the instrument, such omission is so clearly negligent, and so likely to result in injury to the pledgor, that there can be no doubt that the pledgee has failed in his duty, and ought to be held answerable for the consequences. So, if through the supineness of the pledgee a lien is lost or property within his reach is allowed to be removed or applied to other demands, his want of diligence and its injurious results are equally apparent. Hence holders of collateral security must be held remiss in their duties, and therefore liable to the pledgors when it appears that having judgments as collateral they failed to cause execution to issue and to be levied when they might have done so: *Harper v. Second Nat. Bank*, 12 Lea, 678; *Wood v. Morgan*, 5 Sneed, 78; or they allowed the lien of the judgment to expire when they might by proper measures have revived it and kept it alive: *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. So if collateral is secured by a lien which is lost through the pledgee's failure to prosecute proper proceedings to foreclose it: *Hazard v. Wells*, 2 Abb. N. C. 444; *Russell v. Weinberg*, 2 Abb. N. C. 422; *Northern Ins. Co. v. Wright*, 20 N. Y. Sup. Ct. 168; *Plymouth Co. Bank v. Gilman*, 6 Dak. 304; or the right to bring action on the collateral, whether secured by a lien or not, becomes barred by the statute of limitations because of the pledgee's inaction, there can be no doubt that he has not done his duty to the pledgor: *Semple etc. Mfg. Co. v. Detweiler*, 30 Kan. 386. In all these cases the want of diligence is so unquestionable, that the presump-

tion of negligence can scarcely be rebutted, though it is always open to the pledgee to show that no injury was suffered by the pledgor from the apparent want of diligence: *Steyer v. Bush*, Smedes & M. Ch. 172. No extraordinary diligence is exacted of a pledgee in any event. All that the law requires is ordinary diligence, and whenever it is exercised, he is not liable, though it may appear that by greater diligence the collateral might have been collected and the pledgor saved from loss: *Miller v. Gettysburg Bank*, 8 Watts, 192; 34 Am. Dec. 449, and note; *Chaffe v. Purdy*, 43 La. Ann. 389; *Carvin v. Jones*, 23 Ga. 175; *Lamberton v. Windom*, 18 Minn. 506; *Slevin v. Morrow*, 4 Ind. 425; *Wells v. Wells*, 53 Vt. 1; *Reeves v. Plough*, 41 Ind. 204. Where promissory notes secured by mortgages were transferred as collateral, and the mortgages contained powers of sale under which the holder of the notes might, at any time when interest was due and unpaid, have had the mortgaged property sold, and thus compelled payment, the failure to exercise such powers resulting in loss of interest through depreciation in the property, the holder of the collateral was held liable for such loss. The court in its opinion said: "It is undoubtedly the law that the pledgee of a chose in action who receives it as collateral security is bound to use, not extraordinary care, as the master seems to have supposed, but ordinary or reasonable care or diligence to secure its payment when due: 1 Am. Lead. Cas. 402, 403; *Lawrence v. McCalmont*, 2 How. 426; *Kiser v. Ruddick*, 8 Blackf. 382. The law implies on the part of the pledgee, from the nature of the transaction, an agreement to use such care to protect the pledgor's interest and make the pledge available. Accordingly, if the pledge consists of indorsed negotiable paper, the pledgee must present it for payment at maturity, and, if it is not paid, must give notice to charge the indorser, or, if loss ensues, he will be liable to make it good: 1 Am. Lead. Cas. 123, 124; *McLaughan v. Bovard*, 4 Watts, 308; *Ormsby v. Fortune*, 16 Serg. & R. 302; and there are cases which go so far as to hold that the pledgee will be liable for neglecting to put the collateral in suit, when a prudent man would do it, if any loss results from the neglect: *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301; *Wakeman v. Govey*, 10 Bosw. 208; *Slevin v. Morrow*, 4 Ind. 425; *Ex parte Mure*, 2 Cox, 63; *Williams v. Price*, 1 Sim. & St. 581; *Lyon v. Huntingdon Bank*, 12 Serg. & R. 61; *Hoard v. Garner*, 10 N. Y. 261; but see 1 Am. Lead. Cas. 404. This being the law, we do not see how defendant can justify her neglect to collect the installments of interest as they accrued, especially when we consider how cheap and expeditious a means she had of enforcing payment in the powers of sale contained in the mortgages. We have no hesitation, therefore, in holding that, having neglected to enforce the payment of the interest when she could so easily have done so, she must herself be held responsible for it": *Whitin v. Paul*, 13 R. I. 42. The cases in which the holder of collateral has been held answerable for loss of the debt, through his failure to prosecute an action thereon, where the statute of limitation has not interposed through his inaction, are very infrequent, and we do not know of any in which his liability has been enforced, except when he was asked by the pledgor to take action and refused, or circumstances were called to his attention making it manifest to a man of ordinary intelligence that inaction must almost certainly result in loss. If it appears that the maker of the collateral was insolvent when it was transferred to the pledgee, and so continued, no laches will be imputed to the latter: *Powell v. Henry*, 27 Ala. 612. When the principal debt is paid, then the only duty of the holder of the collateral is to keep it safely until he can return it to the pledgor, and

he does not owe any duty to the latter, after such payment, to take steps for the collection of the collateral: *Overlock v. Hills*, 8 Me. 383.

The holder of negotiable securities, whether they consist of negotiable instruments or not, must exercise at least ordinary care in keeping them safely and thus preserving them from loss: *Petty v. Overall*, 42 Ala. 145; 94 Am. Dec. 634; Jones on Pledges, sec. 403-405, 410, and this duty does not terminate on the payment of the principal debt if the securities have not been surrendered to the pledgor. Thus where a bank received as collateral security certain bonds, coupons, and stocks, the title to which was transferable by delivery, and which, after the payment of the principal debt, were stolen from the custody of the bank through its failure to exercise ordinary care, it was held to be answerable for the loss: *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; but something more than the loss of the securities is required to make the holder answerable. Such loss must have resulted from his failure to exercise ordinary care: *Mills v. Gilbreth*, 47 Me. 320; 74 Am. Dec. 787; Jones on Pledges, secs. 510, 511. Therefore if they are lost by burglary or larceny without there being any want of ordinary care on the part of the holder, he is not answerable: *Winthrop Sav. Bank v. Jackson*, 67 Me. 590; 24 Am. Rep. 56; *Jenkins v. National etc. Bank*, 58 Me. 275; *Dearborn v. Union Nat. Bank*, 61 Me. 369. The duty of the pledgee is not to be measured, or necessarily to be judged, by the manner in which he takes care of his own property. It is merely to exercise ordinary care, and is not increased by the fact that he exercises unusual care and diligence in his own affairs and in the protection of his own interests, nor is it diminished by the fact that he is negligent and inattentive to his own interests as well as to those of others committed to his care. In all instances there must be exercised such care and diligence in the custody of collaterals as persons of common prudence would exercise under like circumstances in keeping similar property: *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Scott v. Crews*, 2 S. C. 522, 535.

If the property taken does not consist of choses in action to be collected by suit, but of stocks or other property which the creditor is given power to sell and to apply the proceeds to the payment of his debt, he may, by not acting promptly suffer the property to remain in his hands unsold until it is wholly or partly lost or destroyed, or has depreciated in value, so that it clearly appears that it would have been better for the pledgor if the pledgee had promptly exercised his power to sell; and then the question presenting itself for decision is, which of the parties must bear the loss of the creditor's inaction. If the pledgor has not demanded that the power to sell be exercised and the property disposed of, the authorities agree that the pledgee does not owe to him the duty of selling upon default in the payment of the principal debt, nor at any other particular time: *Colquitt v. Stultz*, 65 Ga. 305; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Richardson v. Insurance Co.*, 27 Gratt. 749; *Rozet v. McClellan*, 48 Ill. 345; 95 Am. Dec. 551; *Howard v. Brigham*, 98 Mass. 133; *O'Neill v. Whighman*, 87 Pa. St. 394; *Granite Bank v. Richardson*, 7 Met. 407. Whether the pledgor may, by notice to the pledgee, require him to sell and hold him answerable for such loss as may result from a delay in selling, is by no means well settled. It appears clear that he cannot insist upon a sale immediately. Some of the decisions proceed upon the theory that it is the duty of the pledgee not to be negligent in respect to the making of the sale, and that the fact that the pledgor had in vain requested a sale, may at least tend to prove negligence on the part of the pledgee in not making it: *Goodall v. Richardson*, 14 N. H. 572; *Franklin*

Sav. Inst. v. Prectorius, 6 Mo. App. 473. In one case it was proved that the pledgor of stocks as collateral told the pledgee that he wanted them sold if the principal debt was not paid when it fell due; that the debt became due in December, 1875; that the stocks about three months after that date were worth thirty dollars per share, and the pledgee sold them two years later for twenty-eight dollars per share. The trial court instructed the jury that if the pledgor gave notice of his wish that the stock be sold at the maturity of the note, then that it was the pledgee's duty to make such sale within a reasonable time, and that if he did not so sell, he was liable for the subsequent depreciation of the stock. This instruction was held to be erroneous. "The property," said the court, "as such, is still that of the pledgor, and of this the pledgee assumes the custody and care. The pledgee has *ius in re aliena*, a special right in the pledgee's property for the purpose of compelling the pledgor to pay the debt. The pledgee stands to a certain extent in a fiduciary relation, and therefore cannot ordinarily purchase the property when sold. The pledgor retains a double interest in having his debt paid and in the possible surplus; but as the pledgee has taken possession the pledgor can make the sale only through the pledgee; but if the pledgee has the right to make his claim out of the property and it has been put into his hands for this purpose, how can it be said there is a right in the pledgor to require the sale at a given time? This virtually asserts in him a right he has surrendered with the pledge. To say that the debtor has an absolute right to require the sale at a given time is to say that the creditor is not to exercise his judgment and skill in the management of his own special property. On the other hand, so far as the pledgor's interest is involved, the pledgee ought only to be responsible for negligence, not for failure which may be consistent with diligence, and even indicate vigilance and skill in calculating the chances of the market. Refusal to sell upon the request of the debtor may, on the other hand, tend to show negligence or want of reasonable care, it being merely a fact to be considered with other facts": *Franklin Sav. Inst. v. Prectorius*, 6 Mo. App. 473.

In a case in which it was claimed that the mode of selling property had not been such as was for the best interest of the pledgor, and had resulted in his loss, the trial court instructed the jury that the pledgee "was bound to use due diligence and care in the sale of the stock to protect the rights of the plaintiff; that he must use the same care, diligence, and prudence in the sale that a prudent man would in the sale of his own property." The course which the plaintiff contended had been injurious to him was the selling of a certificate of stock without dividing it into small lots. The instruction given by the trial court was pronounced erroneous, because by it "the jury may have been misled into the belief that the duty of the defendant was to exercise the same prudence and diligence which a prudent owner would exercise in determining the time when he would sell his own stock, and whether he would sell each certificate as a whole or in parcels"; and because the only duty of the defendant after he had determined to sell the stock "was to exercise reasonable care and diligence to obtain whatever the stocks were worth at the time he sold them": *Newsome v. Davis*, 133 Mass. 343. There is no doubt that it is the duty of the holder of collateral not to act under the influence of motives injurious to the pledgor, and the latter may recover damages for an injury resulting in a delay to make a sale of stock pledged as collateral, if the purpose of such delay was to enable the pledgee to perfect a scheme which it and its officers then entertained of depreciating

the stocks before offering them for sale: *Napier v. Central etc. Bank*, 68 Ga. 637.

The Liabilities of the holder of collateral securities may best be understood by considering his rights and duties, of which we have already treated; because he is for some purposes at least regarded as the owner of the property, he must be subject to some extent to the liabilities of an absolute owner. Thus, if stock has been transferred to him as collateral, so that he appears on the books of the corporation as a stockholder, he is liable to the same extent as an absolute stockholder in an action by creditors of the corporation to compel the payment of unpaid subscriptions: *Pullman v. Upton*, 96 U. S. 328; and also to actions to enforce the personal liability of stockholders in those states whose statutes or constitution impose a personal liability upon stockholders for the corporate debts or some portion thereof: *Bowden v. Farmers' Bank*, 1 Hughes, 307; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 137; *Magruder v. Colston*, 44 Md. 349; 22 Am. Rep. 47; *Crease v. Babcock*, 10 Met. 524, 545; *First Nat. Bank v. Higham Mfg. Co.*, 127 Mass. 563; *Rosevelt v. Brown*, 11 N. Y. 148; *Aultman's Appeal*, 98 Pa. St. 505; *Ersine v. Lowenstein*, 82 Mo. 301. In several of the states statutes have been enacted relieving holders of stock as collateral of this liability; and where such statutes are in force, it is competent to prove by parol evidence that though stock stood on the books of a corporation in the name of a person, yet that he in fact merely held them as collateral, and such proof being made, he is not answerable for the debts of the corporation: *McMahon v. Macy*, 51 N. Y. 155; *Burgess v. Seligman*, 107 U. S. 20; *Union Savings Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. The decisions maintaining the liability of the holders of stock as collateral for the debts of the corporation or for unpaid subscriptions proceed, we apprehend, upon the ground that the statutes imposing personal liability upon stockholders had intended to make answerable all persons who on the books of the corporation appear to be the owners of stock, and on whose financial responsibility the creditors have therefore probably relied. Hence, if a holder of stock as collateral does not appear on the books to be the owner of the stock, he is not personally answerable to the creditors of the corporation: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. Except in the case of corporate stocks, we have not met with any decision holding the owner of collateral security liable for anything except his violation of his duties to his pledgor. We have already referred to the duties of the pledgee to exercise ordinary care in the custody and preservation of the property, and his consequent liability for the non-observance of such duty. The interest which the pledgee has in the pledged property does not ordinarily entitle him to use it for his own purposes, if such use can diminish its value, or otherwise injure the pledgor: *McArthur v. Howell*, 72 Ill. 358; *Thompson v. Patrick*, 4 Watts, 414; *Lawrence v. Maxwell*, 53 N. Y. 19; note to *Locketts v. Townsend*, 49 Am. Dec. 736. "Where a pledge is made by a debtor to his creditor to secure his debt for a certain term, the law requires that the latter shall safely keep it without using it, so as to cause any detriment thereto; but if detriment happens within the term appointed, it must be set over against the debt according to the damage sustained": *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248. For a misuse or abuse of the property pledged, the pledgee is answerable to the pledgor, and the latter may, at his election, treat it as a conversion of the property, and recover damages accordingly: *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *De Tolleners v. Fuller*, 1 Mill. Const. 117; 12 Am. Dec. 616, and note. If the property

pledged is of such a character that use will not injure it, nor expose it to peril of loss, the pledgee does not incur liability by using it; and if it is of such a character that use is necessary in properly caring for it, then it becomes his duty to so use it that it will not suffer from its disuse: *Jones on Pledges*, sec. 394. If from the use of the property pledged profits are derived, the pledgee must account therefor to the pledgor, and apply the net proceeds of such use to the extinction of the debt: *Geron v. Geron*, 15 Ala. 558; 50 Am. Dec. 143; *Houton v. Holliday*, 2 Murph. 111; 5 Am. Dec. 522; *Woodward v. Fitzpatrick*, 9 Dana, 117. So if any profits accrue from property held as collateral, such profits, while they may be collected and retained by the pledgee, must be credited to the pledgor, or applied to the sum due from him, as where dividends accrue on pledged stock, or interest is collected on a security held as collateral: *Jones on Pledges*, secs. 398, 399. If property held as collateral consists of negotiable instruments, demand for and notice of non-payment of which is essential to preserve the liability of parties thereto, or of some of them, or action upon which is necessary to preserve some lien, or to prevent the operation of the statute of limitations, it is, as we have already shown, the duty of the holder to make such demand or give such notice, or to take such action as will prevent the loss of the lien or the right of action on the debt, and the failure to discharge either of these duties renders him liable to the extent of the loss sustained by the pledgor. A holder of collateral also becomes liable to the pledgor for any violation on the part of the former of the express or implied contract between them, and for the doing of acts inconsistent with such contract. On the payment of the debt and demand for a return of the property, the holder becomes liable for all damages resulting from his refusal to restore it: *Cass v. Hygenhotam*, 100 N. Y. 248; *Furnell v. Importers' etc. Bank*, 90 N. Y. 483; *Merchants' etc. Bank v. Misonic Hull Trustees*, 62 Ga. 271. The pledgee is also answerable for any misappropriation of the collateral, whether made by himself or his agent: *Reynolds v. Witts*, 13 S. C. 5; 36 Am. Rep. 678; as well as for any surplus which may remain in his hands after the satisfaction of the principal debt: *Hunt v. Nevors*, 15 Pick. 509; 26 Am. Dec. 616; *Union Nat. Bank v. Roberts*, 45 Wis. 373; or such part of the principal debt as the collateral was given to secure: *Fridley v. Bowen*, 103 Ill. 633.

For an Unlawful or Unauthorized Use of Collateral the holder is generally, at the election of the pledgee, liable as for its conversion, as where the pledgee transfers or pledges the property without authority to do so: *Fay v. Gray*, 124 Mass. 500; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69. If, however, the pledge or transfer is not such as could injure the pledgor, nor in any way or to any extent inconsistent with his rights, and his property remains in such a condition that it could be delivered to him at any time when he should become entitled thereto, there is no conversion and therefore no liability: *Day v. Holmes*, 103 Mass. 306; *Heath v. Griswold*, 5 Fed. Rep. 573. So if the property held as collateral consists of a certificate of stock in a private corporation, the fact that it is sold or pledged without the consent of the pledgor, does not constitute a conversion if the pledgee retains in his possession ready for delivery an amount of stock equal to that held by him as collateral: *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282; *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311, and note. This rule is probably equally applicable to municipal and governmental bonds: *Stuart v. Bigler*, 98 Pa. St. 80. If, through the payment of the principal debt or otherwise, the right to hold the collateral terminates, and the pledgee refuses to deliver it on demand to the pledgor, the latter may sustain an action for its conversion:

Flowers v. Sproule, 2 A. K. Marsh, 54; *Lawrence v. Macmillan*, 53 N. Y. 19; *Decker v. Mathews*, 12 N. Y. 313; *McCalla v. Clark*, 55 Ga. 53; *Kullman v. Greenebaum*, 92 Cal. 403; 27 Am. St. Rep. 150. The same result follows when the pledgee, though he does not refuse to return the property fails to do so because he has wrongfully sold or used it, or has otherwise rendered himself without power to comply with his duty: *Gay v. Moss*, 34 Cal. 125; *Wheeler v. Newbould*, 16 N. Y. 392; note to *Locketts v. Townsend*, 49 Am. Dec. 735. If the holder of collateral sells it without authority to do so, or, having authority to sell, does not pursue such authority so as to make the sale valid, the sale, at the election of the pledgor, may be regarded as a conversion of the collateral and the pledgee held liable therefor in an action of trover: *Nabring v. Bank of Mobile*, 58 Ala. 201; *Rosenzweig v. Frazer*, 82 Ind. 342; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779, or in any other appropriate proceeding: *Fowle v. Ward*, 113 Mass. 548; 18 Am. Rep. 534. If the sale was to the pledgee himself when he was not authorized to purchase, it may be treated as valid or not as the pledgor may elect. If he elects to affirm the sale, then it is valid for all purposes, and the only liability of the pledgee is to credit the pledgor with the proceeds of the sale or to otherwise account to him therefor: *Killain v. Hoffman*, 6 Ill. App. 200. If, on the other hand, the pledgee elects to disaffirm the sale, then it must be treated as never having taken place, and therefore as creating no liability against the pledgee. He holds the property as before the sale with the duty to keep it safely, and the right to apply it to the satisfaction of his debt: *Bryan v. Baldwin*, 52 N. Y. 232. Though the holder of collateral has attempted to sell it and the form of bidding it in has been gone through with, yet if the sale was unauthorized and the stock never went out of the possession of the pledgee, and he at all times had it on hand so that it could be delivered to the owner, no liability for its conversion exists: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87.

The Measure of Damages for the Conversion of a collateral security by the holder thereof must, upon principle, extend to and be limited by the actual injury suffered by the pledgor. If an unauthorized or invalid sale is made, the pledgee cannot relieve himself from liability merely by accounting for the proceeds of the sale. He must account for and pay the actual value of the property at the time of the conversion: *Jefferson Bank v. Ohio Falls etc. Works*, 20 Fed. Rep. 65; note to *Robinson v. Hurley*, 79 Am. Dec. 505; *Hazzard v. Duke*, 64 Ind. 220; *Succession of Liles*, 24 La. Ann. 559; *Kiser v. Ruddick*, 8 Blackf. 382; *Noland v. Clark*, 10 B. Mon. 239; *Word v. Morgan*, 5 Sneed, 79; *Newcomb v. Baskett*, 14 Bush, 658; *First Nat. Bank v. Boyce*, 78 Ky. 42; 39 Am. Rep. 195; *Cushing v. Seymour*, 39 Mann. 301; *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; *Rumsey v. Laidley*, 34 W. Va. 721; 26 Am. St. Rep. 935; and in some instances the highest market value up to the time of the trial: *Fowle v. Ward*, 113 Mass. 548; 18 Am. Rep. 534; *Sturgis v. Keith*, 57 Ill. 451; *Markham v. Janelon*, 51 N. Y. 235; *Romaine v. Van Allen*, 26 N. Y. 309. If the collateral consists of promissory notes or instruments for the payment of money, doubtless the amount recoverable thereon by their terms is presumed to be the measure of damages for their conversion: *Hazzard v. Duke*, 64 Ind. 220. Sometimes, as in the principal case, the holder of collateral has surrendered it to the maker without having any right to do so, or has transferred it without authority, and with respect to cases of this class it has been insisted that the pledgee should be treated as electing to accept the security so transferred or surrendered at its face value, to be applied in satisfaction of his debt, irrespective of its actual value or of the injury

suffered by the pledgor from the improper transfer or surrender: *Wood v. Matthews*, 73 Mo. 481; *Cocke v. Chaney*, 14 Ala. 65; *Hawks v. Hinchcliff*, 17 Barb. 492. There is no doubt that a holder of collateral securities has no right to make a compromise by which they are surrendered on the payment of a sum less than that actually due thereon, and that he must respond for any damages actually sustained by the pledgor from so doing: *Union Trust Co. v. Rigdon*, 93 Ill. 458, 470, which, if the makers were solvent, is necessarily the face value of the instrument surrendered: *Depuy v. Clark*, 12 Ind. 427; *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294; but undoubtedly, upon principle, there is no reason why a holder of collateral making a compromise or any other unauthorized disposition thereof should be required to respond for damages which the pledgor has not suffered. If the compromise was advantageous and the amount realized all that could have been obtained, the pledgor is not entitled to any credit beyond the amount resulting from the compromise: *Exeter Bank v. Gordon*, 8 N. H. 66; and so where a security is improperly surrendered or otherwise converted, the measure of damages is not necessarily the amount due but is the actual value of the property converted, which in the event of the maker being insolvent, is nothing: *Potter v. Merchants' Bank*, 28 N. Y. 641; 86 Am. Dec. 273; *Vose v. Florida R. R. Co.*, 50 N. Y. 369; *Griggs v. Day*, 136 N. Y. 152; 32 Am. St. Rep. 704.

Remedies against Third Persons. — Every bailee may maintain an action against a third person, who while such bailee is in possession or entitled to possession of the subject of the bailment, seizes or converts it or otherwise injures it or interferes with the rights of the bailee to his damage: *Elkins v. Boston M. R. R. Co.*, 19 N. H. 337; 51 Am. Dec. 184; *Little v. Fossett*, 34 Me. 545; 56 Am. Dec. 671; *Brewster v. Warner*, 136 Mass. 57; 49 Am. Rep. 5; *American Dist. Tel. Co. v. Walker*, 72 Md. 454; 20 Am. St. Rep. 479. If a collateral security, as in the case of a warehouse receipt or bill of lading, entitles the holder to the possession of the property, he may maintain an action against any third person who interferes with such possession or does any other act prejudicial to the holder of the security. If the collateral consists of promissory notes or other evidence of indebtedness, the holder may maintain an action of trover or replevin against any one who unlawfully seizes, retains, or converts them. The object of taking security of this class of collateral is to obtain the proceeds thereof either through the voluntary action of the makers or by compulsory proceedings against them. The holder of the collateral may therefore sue thereon with like effect as if he were the absolute owner and he need not make his pledgor a party to the action nor otherwise take any notice of the pledge. He is at all times entitled to demand and receive the money due upon such securities, and whenever they are not paid when due to enforce payment by proper action: *Dix v. Tully*, 14 La. Ann. 460; *Jones v. Hawkins*, 17 Ind. 550; *Rowe v. Haines*, 15 Ind. 445; 77 Am. Dec. 101; *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301; *Hunt v. Nevers*, 15 Pick. 500; 26 Am. Dec. 616; *Van Riper v. Baldwin*, 85 N. Y. 618; *Kinney v. Kruse*, 28 Wis. 183; *Turbell v. Sturtevant*, 26 Vt. 513; *Haydon v. Nicoletti*, 18 Nev. 290; *Houser v. Houser*, 43 Ga. 415; *Hilton v. Waring*, 7 Wis. 492. His right of action cannot be lost by the death of his debtor: *Huyler v. Duhoney*, 48 Tex. 234; *Bennett v. Stoddard*, 59 Iowa, 654, nor is it dependent upon the principal debt being due: *Jones v. Hawkins*, 17 Ind. 550. The amount of his recovery is in ordinary cases the full amount due on the collateral: *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219; 98 Am. Dec. 368; but if there exists any defense which might be asserted against the pledgor were he the plaintiff in the action, then the

recovery of the holder of the collateral may be limited to the amount due him upon the principal debt: *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219; 98 Am. Dec. 368; *Steere v. Benson*, 2 Ill. App. 560; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Valette v. Mason*, 1 Ind. 288; *Mayo v. Moore*, 28 Ill. 428.

If several securities are held as collateral for one debt, the holder cannot be compelled to surrender either until his debt is fully paid, and he may maintain actions upon any or all of the securities either at the same time or at different times, and the recovery upon one cannot impair the right to recover upon another, unless it has produced the satisfaction of the principal debt in whole or in part: *Andrews v. Scotten*, 2 Bland. 629; *Union Bank v. Laird*, 2 Wheat. 390; *Elder v. Rouse*, 15 Wend. 218.

Remedy by Suit on the Principal Debt. — The holding of collateral securities does not suspend the right of action upon the principal debt. Whenever it is due, the creditor may enforce its payment by action without taking any notice of the collateral: *Rogers v. Ward*, 8 Allen, 357; 85 Am. Dec. 710; *Marschuetz v. Wright*, 50 Wis. 175; *Dugan v. Sprague*, 2 Ind. 600; *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243; *Bank of United States v. Peabody*, 20 Pa. St. 454. Nor will the recovery of judgment upon the collateral affect the right to recover upon the principal debt: *Burnheimer v. Hart*, 27 Iowa, 19; 99 Am. Dec. 641; 1 Am. Rep. 209. Such judgment merely takes the place of the securities on which it was recovered, and stands, as they stood, as collateral security for the payment of the principal debt: *Harding v. Hawkins*, 141 Ill. 579. No agreement is implied from the acceptance of collateral that the creditor will first seek to satisfy his demand by enforcing the collateral. Hence the giving of a collateral cannot suspend the cause of action upon the principal debt in the absence of an express agreement for such suspension: *Mills v. Gould*, 14 Ind. 278; *Dugan v. Sprague*, 2 Ind. 600; *De Cardova v. Barnum*, 130 N. Y. 615; 27 Am. St. Rep. 538; *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243; *Cary v. White*, 52 N. Y. 138. In truth, even though there is an express agreement not to sue until the securities are collected and accounted for, unless they should first be returned, the right of action on the principal debt does not appear to be suspended. The only remedy in the event of the creditor bringing action thereon is to sue him for the damages resulting from the breach of his agreement: *Foster v. Purdy*, 5 Met. 442.

If the maker of paper transferred as collateral should wrongfully obtain possession of it, or wrongfully detain it after having rightfully been in his possession, the pledgee may maintain an action against him for the conversion thereof: *Way v. Davidson*, 12 Gray, 465; 74 Am. Dec. 604.

While the mere giving of a collateral does not suspend the right of action upon the principal debt, it may often become a material subject of inquiry in such action, because if it has been disposed of, or proceeds from it have otherwise been realized, they should be credited on the principal debt, and an issue respecting them may be tendered by the answer, and the plaintiff required to account for the proceeds of the collateral. So, though nothing has been realized from the collateral, yet if the failure to realize has arisen from such want of diligence that the holder is answerable for the face value of the collateral, or to any other extent, he can recover on the principal debt only so much thereof as remains unpaid after charging him with the amount of the collateral for which he has become answerable through his negligence or want of diligence: *Reeres v. Plough*, 41 Ind. 204. If the principal debt is secured by an indorsement, or guaranty, or other contract of

suretyship, the creditor's right of action against the indorser, guarantor, or surety is not suspended by reason of the existence of the collateral security, nor can any of them, in the absence of an agreement to the contrary, insist that the collateral security shall be first exhausted or pursued before maintaining an action against him: *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66; *Ross v. Jones*, 22 Wall. 576, 592. One whose liability is in the nature of surety is, however, interested in the collateral securities; he has a right to be subrogated to them upon his payment of the principal debt: *Jones v. Tinscher*, 15 Ind. 308; 77 Am. Dec. 92; *Pott v. Nothans*, 1 Watts & S. 155; 37 Am. Dec. 456; and therefore any release or surrender of such collaterals may prejudicially affect his interests, and wholly or partly release him from liability under his contract of suretyship: *Baker v. Briggs*, 8 Pick. 121; 19 Am. Dec. 311; *Hayes v. Ward*, 4 Johns. Ch. 129; 8 Am. Dec. 554; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685; *Springer v. Toothaker*, 43 Me. 351; 69 Am. Dec. 66; *Fitchburg Bank v. Torrey*, 134 Mass. 239. So if the surety has taken collateral securities for the payment of the principal debt, the creditor is interested in them, and may insist upon their application to the payment of his debt: *Maure v. Harrison*, 1 Eq. Cas. Abr.; Jones on Pledges, secs. 523, 525, 526; *Taylor v. Farmers' Bank*, 87 Ky. 398; *Knapworth v. Dressier*, 13 N. J. Eq. 62; 78 Am. Dec. 69; *Green v. Dodge*, 6 Ohio, 80; 25 Am. Dec. 736; *King v. Harman's Heirs*, 6 La. 607; 26 Am. Dec. 485; *Morrill v. Morrill*, 53 Vt. 74; 38 Am. Rep. 659.

Remedies on Choses in Action. — If the collateral consists of choses in action collectible by suit, the holder's remedy upon them is generally restricted to such suit. He is not, unless express authority to that effect has been conferred upon him by the pledgor, entitled to sell them: *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Union T. Co. v. Ripston*, 93 Ill. 458; *Whitaker v. Charleston G. Co.*, 16 W. Va. 717; *Fletcher v. Dickinson*, 7 Allen, 23; *White v. Phelps*, 14 Minn. 27; 100 Am. Dec. 190; *Wheeler v. Newbould*, 16 N. Y. 332: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default in payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge occupies the relation of trustee for the owner, and, as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, property can only be applied as security through the process of sale. Not so with bonds, mortgages, or promissory notes: *Wheeler v. Newbould*, 16 N. Y. 392"; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 584; 25 Am. Rep. 341.

The reason why a holder of choses in action as collateral is ordinarily not allowed to sell them but is required to proceed to collect them by suit, if necessary, is that they are not presumed to be readily marketable or to have a market value, and their sale would probably expose the pledgor to needless loss, and for want of their ascertainable market value, it would rarely be possible to know whether they had sold for a fair price or not. With respect to choses in action having an ascertainable market value, the reason for the rule does not exist and the rule is therefore inapplicable. In New Jersey coupons and bonds of a private corporation having been transferred as collateral, the question arose as to whether they could be sold by the pledgee, or whether it was his duty to retain them until they could be collected by suit, and the court of errors and appeals in deciding

the question, said: "When bonds of such a character, having several years to run before they become due, are deposited as collateral security for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold after demand and due notice like goods, chattels, and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, and the like choses in action, which in the absence of an agreement to that effect, the creditor cannot expose for sale because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them": *Morris Canal etc. Co. v. Lewis*, 12 N. J. Eq. 329. The fact that a bond or coupon will not fall due for a long period of time, and therefore cannot be collected by suit within the time in which the parties apparently contemplated that the principal debt should be paid, constitutes an unanswerable reason for deciding that the holder of it as collateral should be allowed to sell it where it has a market value, at any time after the maturity of the principal debt, and apply the proceeds to the extinction of that debt. We apprehend, however, that the existence of this reason is not indispensable to the authority to sell, and that if the security held as collateral is one of a class having a market value, and being sold from time to time in the market as the stocks of corporations are, then that the pledgee has an implied authority to sell it under the same circumstances as would authorize a sale of such stocks had they been pledged as collateral for the same debt: *Water Power Co. v. Brown*, 23 Kan. 676; *Alexander etc. R. R. Co. v. Burke*, 22 Gratt. 254.

Remedy by Foreclosure. — If the collateral is not made available by voluntary payment or by suit thereon, then the only mode which can be lawfully pursued by the holder is to sell either by judicial sale or by a sale which, though not judicial, is authorized either by an express agreement or by the agreement which is implied from the contract of pledge. Whether in the case of ordinary choses in action, collectible by suit, a court of chancery will at the instance of a holder as collateral, direct them to be sold, is a doubtful question, but upon principle, relief must be denied where the holder has an adequate remedy by action at law against the makers of the collateral: *Whiteker v. Charleston Gas Co.*, 16 W. Va. 717. If, however, for some cause not attributable to the holder of the collateral, he cannot pursue his action thereon without great difficulty, chancery may grant him relief by directing a sale, as where the maker of the collateral is not within the state, and has no property therein, so that no action against him could be effective unless prosecuted in the courts of another state or nation: *Donohoe v. Gamble*, 33 Cal. 34; 99 Am. Dec. 399; *Carter v. Wake*, L. R. 4 Ch. Div. 605. Unless an exception exists in the case of choses in action having no readily ascertainable market value and collectible by suit against the makers thereof, there is no doubt that in every case a holder of collateral may resort to equity and there obtain a decree fixing the amount for which the property is liable to be sold, and directing a sale to be made by an officer of the court and the proceeds to be applied to the payment of the principal debt: *Sharpe v. National Bank*, 87 Ala. 645; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Robinson v. Hurlen*, 11 Iowa, 410; 79 Am. Dec. 497, and note, p. 503. The advantages of proceeding in chancery are that the amount of the debt and the right to sell the property for its payment are established beyond any further controversy, and the holder of the collateral has the right to bid at the sale, and may thus prevent any sacrifice of his interest for want of

bidders: *Newport etc. Co. v. Douglass*, 12 Bush, 673; *Quincy v. White*, 63 N. Y. 376.

The parties may by their contract declare the circumstances under which the holder of the collateral is authorized to sell it, and provide what steps shall be taken by him before such sale, and such agreement, unless fraudulent or contrary to public policy, is binding upon both parties, and a sale pursuant to it is valid: *McDowell v. Chicago etc. Co.* 124 Ill. 491; 7 Am. St. Rep. 381; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624; *Union T. Co. v. Rigdon*, 93 Ill. 458; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Carson v. Iowa City etc. Co.*, 80 Iowa, 638. If by the contract, the loan for which collateral is given, is made payable on one day's notice, and the holder of the collateral is authorized to sell without further notice, all notice of the time and place of sale is dispensed with, and the only obligation of the holder of the collateral is to sell it publicly and fairly for the best price he can obtain: *Maryland etc. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779. So where stocks were pledged, and the pledgee, in the event that they were not redeemed before a day specified, was "authorized to give the stock to any broker to sell on such day," it was held that this authorized a sale by any broker by private sale or in any other way: *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69.

Pledgee's Remedy by Sale. — If the parties do not make any express agreement concerning the power of the pledgee to sell and the time and manner in which it may be exercised, then one is implied and is to the effect that at any time after default in the payment of the principal debt, the holder of the collateral may demand that it be paid, or, in other words, that the pledged property be redeemed, and such demand not being complied with, may sell the property at public auction after first giving the debtor reasonable notice of the time and place of the sale, and a sale in the absence of such demand and notice is invalid: *McDowell v. Chicago etc. Co.*, 124 Ill. 491; 7 Am. St. Rep. 381; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624; *King v. Insurance Co.*, 58 Tex. 669; *Wilson v. Brannan*, 27 Cal. 258; *Merchants' Nat. Bank v. Thompson*, 133 Mass. 482; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Luckett v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723; *Gay v. Moss*, 34 Cal. 125; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Brightman v. Reeves*, 21 Tex. 70; *Conyngham's Appeal*, 57 Pa. St. 474. While there are many decisions declaring that the pledgor must have reasonable notice of the time and place of the sale in order that he may know when his opportunity to redeem will terminate, and may, if he can, procure persons to attend the sale and bid thereat, the authorities are singularly silent with respect to the giving of notice of the sale to the general public. Without some such notice it is clear that the property must ordinarily be sacrificed for want of bidders; for to bring out bidders persons interested in the class of property to be sold must in some way have their attention called to the sale. The authorities do, however, make it clear that in the absence of any controlling agreement to the contrary the sale shall be at public auction, and we infer from this that it must be preceded with such public notice as is ordinarily given for auction sales of like property in the same locality. If the agreement between the pledgor and the pledgee purports to authorize the latter, on default of the payment of the principal debt to make the money out of the pledged property in the best way he can and to sell the same for that purpose, it was held that the power should be construed to be such a power as exists in respect to pledges generally, and that it must be pursued in the same way, and therefore can

be exercised only upon reasonable notice to the debtor to redeem and of the time and place of sale: *Goldsmidt v. First M. E. Church Trustees*, 25 Minn. 202. In one instance in which the contract expressly stipulated for notice to the debtor, it was held that a sale without such notice should be sustained where it had become impossible to give it: *City Bank v. Babcock*, 1 Holmes, 181. The better opinion appears to be, that in the event of the making demand for payment and the giving notice of the sale to the debtor becoming impossible, the creditor cannot proceed without them, but must resort to a suit in equity to foreclose the pledge: *Strong v. National etc. Ass'n*, 45 N. Y. 718; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Garlick v. James*, 12 Johns. 150; 7 Am. Dec. 294. There is no doubt that a debtor may waive the demand to redeem and the notice of the time and place of the sale: *Fitzgerald v. Blocher*, 32 Ark. 742; *Hamilton v. State Bank*, 22 Iowa, 306; and that actual notice of such time and place may render unnecessary formal notice from the pledgee: *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254. It appears to be possible by agreement between the parties to authorize the pledgee to purchase the pledged property at a sale made by himself: *Chouteau v. Allen*, 70 Mo. 290; *Appleton v. Turnbull*, 84 Me. 72. In the absence of such an agreement, a sale of the pledgee to himself, whether his name is used or the property is bid off in the name of another for his benefit, is void, and leaves him the owner of the pledge as before such sale: *Cainfield v. Minneapolis etc. Ass'n*, 14 Fed. Rep. 801; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 8 Iowa, 277; 74 Am. Dec. 302; *Stokes v. Frazier*, 72 Ill. 428. If the sale as made was not authorized, the debtor may regard it as a conversion, and recover damages therefor: *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; or as having no effect upon his rights and as leaving him still the owner of the property subject to the pledge. The sale even when to the pledgee himself is not absolutely void, however irregular and unauthorized it may be. The debtor may elect to affirm it, and his election should be presumed and held to be irrevocable if he, with full knowledge of the facts rendering the sale invalid, delays for an unreasonable time to proceed against it, or to take any measures to set it aside and to recover the property: *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279; *Gilmer v. Morris*, 80 Ala. 78; 60 Am. Rep. 85; *Hayward v. National Bank*, 96 U. S. 611; *Lacombe v. Forstall*, 123 U. S. 562; *McDowell v. Chicago Steel Works*, 22 Ill. App. 405.

SOPER v. BROWN.

[136 NEW YORK, 244.]

WILLS—ISSUE, WHO ARE.—The word “issue,” when used in a will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as “descendants.” Hence, if a testator devises property to his daughter E. for life, and declares that upon her death it shall go, in fee-simple, as tenants in common, to her issue if more than one, and in default of such issue, to all the testator’s grandchildren who may be then living, and when the daughter E. dies her children are all dead, but children of theirs are living, such children are comprehended in the term “issue” and take the property in preference to the grandchildren of the testator.

WILLS, CONSTRUCTION OF. — If a will is capable of two constructions, one of which will exclude the issue of a deceased child, and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted.

George H. Adams, for the appellants.

Josiah T. Marean, for the respondent.

ANDREWS, J. Thomas Poole died in 1831, leaving surviving him five daughters, Letitia, Eliza, Mary, Sarah, and Margaret. At his death he owned a farm in what is now the city of Brooklyn. By his will, after giving a small legacy to his daughter Letitia, he devised his farm in specific parcels to trustees upon separate trusts for the benefit of his four daughters, Eliza, Mary, Sarah, and Margaret respectively for life. The remainder embraced in the trust for his daughter Eliza was devised in the language following: "Upon the death of my said daughter Eliza, my further will is that the aforesaid (lands) in this clause of my will devised for the use and benefit of my said daughter Eliza, with the appurtenances thereunto belonging, shall go in fee-simple as tenants in common to the lawful issue of my said daughter Eliza, if more than one, share and share alike, and for want or in default of such issue, then to all my grandchildren who may then be living, as tenants in common, his, her, or their heirs or assigns forever." The remainders in the lands devised in trust to his other daughters for life are given in similar language. The daughters Letitia, Eliza, and Mary were married at the time of the making of the will and at the death of the testator, and the daughters Letitia and Eliza each had children. The two children of Eliza died after the death of the testator and before the death of their mother, but each left children surviving her, and on the death of the testator's daughter Eliza there were living two children of a deceased son of Eliza, three children of Eliza's deceased daughter Margaretta, and three children of a deceased child of Margaretta. The descendants of Eliza living at her death were, therefore, five grandchildren and three great-grandchildren.

The plaintiffs are children of the testator's daughter Letitia, and claim a share of the lands embraced in the trust constituted by the will of Thomas Poole for the benefit of his daughter Eliza, on the ground that Eliza left no "issue" surviving her at her death, and that therefore the gift over, for the want or in default of such issue to "all the (testator's)

grandchildren," took effect. This claim, if well founded, excludes the descendants of Eliza from any share in the property of the testator, since none of them stood in the relation of grandchildren to the testator Thomas Poole, and the whole of Eliza's portion will be diverted from her line and go to children of her sisters.

The question turns upon the meaning of the word "issue" in the gift in remainder "to the lawful issue of my said daughter Eliza." It is insisted on the part of the plaintiff that the word means "children," and that the testator's intention was to provide for his grandchildren only, and to cut off on the death of any daughter all in the line of descent from such daughter who were not in that relation to the testator. This contention, which naturally shocks the sense of justice, must be maintained if required by settled rules of construction. They cannot be varied to meet a supposed hardship in a particular case, although the court will be justified in searching the will to discover, if possible, some explanatory or qualifying provision which would indicate that particular words were used in a sense consistent with what seems to be, under the circumstances, the natural intention and the ordinary dictates of feeling and affection. It is claimed that the word "issue" used in a will, when unexplained by the context, has the meaning of "children." If this predicate is justified it bears strongly in favor of the construction claimed by the plaintiffs, for it must be admitted that there are but very slight indications, if any, in the will that the word was used in any other than its legal sense; but I am of opinion that the word "issue" in a deed or will, when used as a word of purchase, and where its meaning is not otherwise defined by the context, and there are no indications that it was used in any other than its legal sense, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants," and that while it embraces the children of the ancestor, it is because they are descendants in common with all other persons who can trace direct descent from a common source. It is common learning that this has been the accepted meaning of the word "issue" in that large class of limitations to issue of the first taker, accompanied with a gift over in default of issue. The question in these cases, which has given rise to a mass of abstruse and difficult learning, has been whether in particular deeds or wills an indefinite failure of issue was intended,

which would render the gift over void as a perpetuity, or a failure of issue living at the death of the first taker, or on the happening of some other event within the period allowed by law for restraint of alienation. In this state the statute has wisely solved these distressing perplexities, and makes a limitation over to issue on the death of the first taker to mean issue living at his death: 1 Rev. Stats., 724, sec. 22; but it was never contended, so far as I know, in these cases, that the word "issue" means "children" to the exclusion of remoter descendants.

There are many authorities on wills in which the word has been construed to mean "children" only. These authorities rest upon the undisputed principle that words used by a testator in his will are to be interpreted in the sense which he attributed to them, where it appears by the context that they were not used in their strict legal sense. It is but one of the applications of the doctrine that in the construction of wills the intention of the testator is to govern when not inconsistent with the rules of law. In *Sibley v. Perry*, 7 Ves. 522, the word "issue" was held to mean "children," because coupled with and used as the antithesis of the word "parent"; but Lord Eldon, while reaching this conclusion upon the words of the particular will, said: "Upon all the cases, this word (issue) *prima facie* will take in all descendants beyond immediate issue." *Palmer v. Horn*, 84 N. Y. 516, was a case of the same character, where the word "issue" was held to mean "children," from its juxtaposition with the latter word, which explained and limited it. Mr. Jarman and other text-writers state the rule in conformity with the great weight of authority, that while the meaning of the word "issue" is not inflexible, and may in some cases designate "children" only, depending upon the intention as disclosed upon the whole instrument, nevertheless, where its meaning is not restrained by the context, it is to be interpreted as synonymous with "descendants," and as comprehending objects of every degree, and that the construction is the same whether used in a bequest or devise: 2 Jarman on Wills, 101; 2 Williams on Executors, 1112; 2 Washburn on Real Property, 561. In the early case of *Cook v. Cook*, 2 Vern. 545, which was the case of a devise to the issue of J. S., it was held that children and grandchildren were comprehended.

It is urged that the popular meaning of the word "issue" is synonymous with "child" or "children." If this were

admitted, it would not control the construction of a formal will, where words are supposed to be used in their legal sense in the absence of a contrary indication. In a note in 4 Kent's Commentaries, '278, said to have been written by the author, it is stated that the word "issue" is generally used as synonymous with "child" or "children"; and in *Ralph v. Carrick*, 11 Ch. Div. 882, James, L. J., remarks that this was its popular meaning; but with great respect I am not sure that this is correct as a general proposition. It is very unusual, I think, for a parent to speak of his children as his issue, either during life or in a testamentary instrument. When one speaks of the "issue" of a person deceased, I think in most cases he would intend his descendants in every degree. In popular language, if one speaks of the issue of a marriage, he probably means the children of the marriage. The collocation of the words "issue" and "marriage" makes this in the case supposed the natural meaning. It was said by Lord Loughborough in *Freeman v. Parsley*, 3 Ves. 421, that "in the common use of language, as well as in the application of the word 'issue' in wills and settlements, it means all indefinitely." This seems to me to be nearer the truth than the opposite view, or at least I am of the opinion that in the majority of cases where the word "issue" is used, it is used in its legal sense. There are cases where it may be conjectured that this broad meaning would produce a result not contemplated by a testator. It is settled that under a gift to "issue," where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares *per capita*, and not *per stirpes*, as primary objects of the disposition. It might well be doubted whether a testator actually contemplated that the children of a living parent would take an equal interest with the parent under the word "issue," or that the issue of a deceased child should not take by representation the share of its parent. Lord Loughborough referred to this in *Freeman v. Parsley*, 3 Ves. 421; and while he held that all were entitled equally *per capita*, said that he expected that it was contrary to the intention, and regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents; but in a case like the present one, where there is a gift to a child for life and over, on the death of

such child, in default of issue, it would be an unnatural construction which would exclude all but the immediate children of the first taker in favor of the other branches of the family. The reasonable construction in such cases is, that the gift over was intended to take effect only on the extinction of the line of descent from the first taker. We perceive no sufficient indication in the will now in question which would justify overriding the legal meaning of the word "issue," and confining it to the sense of "children." The fact that the gift over in default of issue of any child was to "grandchildren," and that remoter descendants could not take under this limitation, is quite indecisive. The testator may have considered that he had made the sufficient provision for the remote descendants of his daughters in providing that their issue should take the portion of the ancestor, and that in providing for the contingency of the death of any one of these without issue, it was not necessary or desirable to have regard to any except grandchildren. Whatever may have influenced the testator in confining the gift over to grandchildren, this affords no definite indication of a purpose to restrict the meaning of the word "issue" in the primary gift. The same remark is applicable to the gift of the residuary personal estate to his grandchildren on the death of the last survivor of his four daughters.

The will received, we think, a proper construction in the courts below. Even if the construction given may be doubtful, it is a settled rule that where a will is capable of two constructions, one of which would exclude the issue of a deceased child, and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted: *In re Brown*, 93 N. Y. 295, and cases cited.

The judgment should be affirmed. All concur.

WILLS — MEANING OF THE WORD "ISSUE." — A devise to the "male issue then living of testator's son," includes all male lineal descendants of that son then living, whether of the same generation or not, and whether tracing descent through males or females: *Wistar v. Scott*, 105 Pa. St. 200; 51 Am. Rep. 197; but where the share of one of the testator's sons was put in trust, such share to go at his decease, if he left no widow, to his "issue," and the son died leaving no widow, but leaving three children and also grandchildren and great-grandchildren, it was held upon a review of the provisions of the will relating to the other sons of the testator, that the children of the son were entitled to his share, to the exclusion of his more remote descendants: *Dexter v. Inches*, 147 Mass. 324.

WILLS SHOULD BE SO CONSTRUED as not to disinherit heirs, unless on so strong a probability that an intention to the contrary cannot be supposed: *Peckham v. Lego*, 57 Conn. 553; 14 Am. St. Rep. 130; *Saylor v. Plaine*, 31 Md. 158; 1 Am. Rep. 34.

PRENTISS TOOL AND SUPPLY CO. v. SCHIRMER.

[136 NEW YORK, 305.]

SALE, CONDITIONAL UPON PAYMENT. — If a sale of machinery is upon condition that it shall remain the property of the vendee until paid for, this condition is valid, and cannot constitute a fraud upon the creditors of the vendee. Neither is the transaction rendered fraudulent, as against such creditors, by an agreement that the vendee may manufacture certain of the materials so sold to him, and may sell the manufactured articles upon condition that the proceeds of the sale shall be accounted for and paid to the vendor, to be applied to the purchase price of the property.

SALE CONDITIONAL — MORTGAGE. — A bill of sale, by a manufacturer, of property which he has manufactured for another, the work thereon being nearly all done, will not be considered a mortgage from the mere fact that he was indebted to his vendee, and some of the witnesses used the word "security" in describing the transaction, if, from the whole evidence, it is apparent that the transfer was absolute.

FRAUD, QUESTION OF — WHEN NEED NOT BE SUBMITTED TO JURY. — Though a sale of personal property is presumptively fraudulent for want of change of possession, yet the evidence rebutting such presumption may be so clear and free from dispute as to justify the court in refusing to submit the question of fraud to the jury.

ACTION for the conversion of personal property, which the defendant had levied upon while in the possession of Cora E. Florence, under attachment against her. Part of this property had been sold to her by the plaintiff, but the sale was upon condition that the title was to remain in plaintiff until payment of the purchase price was completed. Among the articles subject to this sale were some materials which it was agreed she might use in the course of her business as a manufacturer, provided she sold the articles manufactured from them and applied the proceeds to the payment of the balance due plaintiff. None of such materials or of the articles manufactured from them were levied on by the defendant. The other property levied upon had been manufactured by the defendant in attachment under an order from the Rand Drill Company, which was to pay \$240 therefor when completed. The bill of sale of these articles was made to plaintiff on September 15, 1890, but some work remained to be done thereon, and for the purpose of doing it the articles were left in the possession of the manufacturer. The trial judge decided that

the plaintiff's title was made out; that the proof excluded all question of fraud, and that the only matter to be submitted to the jury was the value of the goods levied upon and sold by the defendant.

Ralph E. Prime, for the appellant.

John M. Perry, for the respondent.

ANDREWS, J. The sole point presented by this appeal is whether the question of fraud in respect to the title claimed by the plaintiff to the machinery embraced in the conditional sale of November, 1889, and to the castings embraced in the bill of sale of September 15, 1890, should have been submitted to the jury.

The fact that the plaintiff owned the property embraced in the conditional sale to Cora E. Florence, in November, 1889, at the time of that sale, is undisputed; nor is there any question that a large part of the purchase-money of the machinery was unpaid at the time of the levy of the attachment, September 17, 1890. The title to the machinery was, by the terms of the instrument of November, 1889, to remain in the plaintiff until paid for. This was a valid arrangement, and constituted no fraud upon the creditors of Cora E. Florence: *Cole v. Mann*, 62 N. Y. 1. The instrument seems to have been filed in the clerk's office of the city of Yonkers, November 30, 1889, but no filing was necessary under chapter 315 of the laws of 1884, as against creditors of the vendee. It is not important, therefore, to inquire whether the instrument was filed in the proper office under the terms and for the purposes of that statute. The fact that the vendee was permitted to manufacture the materials embraced in the instrument and sell the manufactured articles, upon condition that the proceeds of the sale should be accounted for and paid to the vendors to apply upon the purchase price of the property, did not impair the rights of the vendor under the instrument of November, 1889, or render it void as to creditors of the vendee: *Cole v. Mann*, 62 N. Y. 1; *Brackett v. Harvey*, 91 N. Y. 214. The proceeds of the sale were in fact applied as provided in the oral arrangement, and this had been done before the debt to Donnelly & Co. had been contracted. We are unable to find that any fact was proved or was inferable from the evidence which raised any question for the jury as to the title of the plaintiff to the machinery levied upon by the sheriff.

The instrument of December 15, 1890, if a mortgage was

void as against the attachment creditor, because not filed before the levy of the attachment: Laws of 1883, c. 279, sec. 1. There was no change of possession of the property embraced therein, and if that instrument was intended as a mortgage, and not as an absolute transfer of the property, the defendant was entitled to direction in his favor as to the part of the goods taken by him included therein. So, also, if the evidence created a doubt whether the instrument was intended as a security merely, and not as an absolute transfer, that question should have been submitted to the jury. But while the word "security" was used by the plaintiff's witnesses in describing the transaction which was evidenced by the instrument, a perusal of the whole evidence leaves no doubt of its actual character. The instrument purported to be an absolute transfer. The castings embraced therein then in the course of manufacture were being made to fill an order given to Cora E. Florence by the Rand Drill Company, for which she was to receive the sum of \$240. The work upon them was nearly completed, and their completion would require an expenditure of ten to twelve dollars only. The unsecured debt to the plaintiff from Cora E. Florence on open account was \$310. There could be no surplus coming to her out of the property after payment of this debt. The circumstances leave no doubt that the instrument of September 15, 1890, was intended as an absolute transfer to the plaintiff of the castings to apply on the plaintiff's debt. Treating it as an absolute transfer, the sale was nevertheless presumptively fraudulent as against the attaching creditors by force of the statute, by reason of the fact that there was no delivery of the goods to the vendee and no actual change of possession (2 Rev. Stats., 136, sec. 5), which presumption was conclusive, unless it was made to appear on the part of the plaintiff that the sale was made in good faith and without any intent to defraud creditors or purchasers.

The defendant insists that the question of fraud based upon the absence of delivery or change of possession of the goods sold, should have been left to the jury. The presumption which the statute creates may be overcome by evidence of the fairness of the transaction. The evidence to establish the *bona fides* in such a case may be weak or strong, and it may be of such a persuasive character, resting upon uncontradicted evidence, that a court could say that the presumption was overcome, and direct a verdict. Where the evidence is such

that admitting the presumption raised by the statute, it is so completely rebutted that a verdict finding the fraud would be set aside, then the statute "does not as now interpreted interfere with the jurisdiction of the court to direct a verdict": *Bulger v. Rosa*, 119 N. Y. 459. The evidence in this case fully repelled the statutory presumption. The debt to the plaintiff was unquestioned. The value of the property was considerably less than the debt. The castings were being finished up and required an expenditure of a few dollars to make them deliverable upon the contract with the Rand Drill Company, and would be presumably of little value for any other purpose. They were left on the premises and in the legal possession of Cora E. Florence, to enable a workman to complete them, and were attached within two days after the bill of sale was executed and while the workman was engaged in finishing them. None of these facts were disputed on the trial, and on the whole evidence a case was furnished which we think justified the court in refusing to submit the question of fraud to the jury.

It is claimed, however, that some of the material facts were proved only by the testimony of the plaintiff's manager and that his credibility could not be assumed by the court, because of his interest, and that of his credibility the jury was the sole tribunal authorized to pass upon it. There is not the slightest ground of suspicion of the truth of any of the material facts in the case. The only fact relied upon by the defendant to impeach the instrument of November, 1889, was disclosed by the testimony of the manager and related to his permission to Cora E. Florence to use the materials embraced in that conditional sale, and sell the manufactured articles, and render the proceeds to be applied on the purchase-money. If this testimony is stricken out, nothing whatever is left upon which any claim could be made affecting the title of the plaintiff to the machinery which constitutes the main item in the judgment. Taking the whole proceedings as disclosed by this record, the just inference is that no question was raised as to the credibility of the plaintiff's manager, and that the truth of his testimony was assumed. The point upon which the request to go to the jury as to the bill of sale of September 15, 1890, was based, was the statutory presumption of fraud, by reason of nondelivery and retention of possession of the property embraced therein, and as to the property embraced in the instrument of November, 1889, that the permission

given to the vendee to sell made the title to the other property therein void as to creditors, or that the jury might so find.

We think the trial judge was justified in directing a verdict, and the judgment should therefore be affirmed. All concur.

SALES. — DISTINCTION BETWEEN CONDITIONAL SALES AND MORTGAGES: See notes to *Munnerlin v. Birmingham*, 34 Am. Dec. 403; *McKnight v. Gordon*, 94 Am. Dec. 183; *Palmer v. Howard*, 1 Am. St. Rep. 63, 64; *Hutzler v. Phillips*, 4 Am. St. Rep. 699; *Gerow v. Castello*, 7 Am. St. Rep. 252. As to the condition against title passing until payment is made, see notes to *Winches-ter Wagon etc. Co. v. Carman*, 58 Am. Rep. 386, 387; *Marvin Safe Co. v. Norton*, 57 Am. Rep. 572-585; *Sumner v. Woods*, 42 Am. Rep. 105-107; *Stutfield v. Huntsman*, 37 Am. Rep. 664-668; *Barrett v. Pritchard*, 13 Am. Dec. 451, 452; *Williams v. Merle*, 25 Am. Dec. 614-616.

FRAUD, WHEN A QUESTION FOR THE COURT. — Evidence of fraud should be submitted to the jury, if from it the jury can properly find the question for the party on whom the burden of proof rests; but, if not, it should be withdrawn from the jury: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

MATTHEWS v. ASSOCIATED PRESS.

[136 NEW YORK, 333.]

CORPORATION — BY-LAWS, CONSTRUCTION OF. — A by-law of a news association prohibiting a member from receiving or publishing the regular news dispatches of any other news association covering like territory and organized for a like purpose, prohibits such member from receiving or publishing dispatches of any other news association whatever, if the association so adopting the by-law does not confine its business to any part of the world, and either by agents or through contracts supplies its members with news from all over the world.

CORPORATION — NEWS ASSOCIATION — RESTRICTIVE BY-LAW, WHAT REASONABLE. — A by-law of a news association prohibiting its members from receiving or publishing the dispatches of any other news association covering the same territory and organized for the same purpose is not unreasonable, nor void as in restraint of trade, and may be enforced.

Charles B. Wheeler, for the appellants.

S. E. Payne, for the respondents.

PECKHAM, J. The plaintiffs-appellants herein procured at special term an injunction against the defendant, The Associated Press, etc., restraining it from suspending the plaintiffs from any of the rights or privileges of or in the Associated Press and from withholding from the plaintiffs (who are printers and publishers of newspapers at Buffalo in this state) the regular telegraphic news and reports procured and furnished

by the Associated Press to its members, for or on account of any alleged violation by the plaintiffs of the provisions of the twenty-fifth by-law of the association. The plaintiffs are members of the association. Upon appeal from the order granting the injunction the general term reversed the same upon the ground that the action to obtain a permanent injunction could not be maintained upon the facts set forth in the complaint and affidavits. The plaintiffs appealed from the order of reversal to this court.

The record shows that the defendant, the Associated Press of the state of New York, was incorporated by virtue of an act of the legislature of this state, passed April 24, 1867 (c. 754, of the laws of that year), and entitled "An act to incorporate the Associated Press of the state of New York." In the act the objects of the association are stated "to be the mutual protection of members of the press, procuring and supplying its members with telegraphic news, upholding and elevating the character and standing, and the promotion and maintenance of the general interest of the profession and its members."

Some time subsequent to its formation the defendant adopted a by-law known as number twenty-five, a part of which is as follows: "25. No member of this association shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose with this association." The by-law then proceeds to provide a penalty for the violation of this provision in the form of a suspension of all the rights and privileges of the association, after an opportunity has been given the accused party to be heard.

It also appears from the complaint that there is an United Press Association which is organized and engaged in procuring and supplying its members with telegraphic news from various parts of the world, and the plaintiffs are members thereof, and by means of its reports and dispatches furnished to them the plaintiffs receive and publish in their newspapers other and different telegraphic news from different parts of the world than that procured and furnished by the defendant corporation, and the plaintiffs are thus enabled to increase the reading matter published in their newspapers and to give fuller and more complete telegraphic news of matters of general and public interest than plaintiffs would otherwise be enabled to do by publishing only the regular news and dispatches of the corporation defendant. The plaintiffs allege

that the United Press Association is not one of which covers a like territory and that it is not organized for a like purpose with the defendant corporation within the meaning of the by-law in question, but that it covers a far wider territory and is organized for a more extended purpose. It is alleged that the defendant corporation only has agents for the collection of news within the state of New York and that the news which it procures from other portions of the world is collected by other news or press agencies and delivered to the defendant corporation under contracts made by it, whereas the United Press Association has agencies for the direct collection of news for it from various parts of the world, outside as well as inside the state of New York. It is alleged that the defendant corporation is about to enforce the above-mentioned twenty-fifth by-law as against the plaintiffs on account of the receipt and publication by the plaintiffs of the news and telegraphic dispatches collected and sent to them by the United Press Association. The membership in the United Press Association and also in the defendant corporation is a valuable property right.

The plaintiffs upon the argument of the appeal here have raised two questions: 1. Whether the by-law in fact prohibits the receipt and publication by them of the dispatches of the United Press Association; 2. If it do, whether it is legal and enforceable.

As to the first question, —

I think the by-law does in fact prohibit such receipt and publication, because the United Press Association covers a like territory and is organized for a like purpose with the defendant corporation.

There is no limit in the charter or act of incorporation of the defendant by which it is confined to any particular territory in the procuring and supplying of its members with telegraphic news. The act leaves it entire freedom to obtain such supply from the whole world. There is no by-law which has been called to our attention that imposes any limit. As there is neither charter nor by-law which limits the territory that the defendant corporation may cover in the execution of its object and purpose, so the record discloses no limitation in that territory arising from the practice of the corporation. It in truth obtains, serves, and supplies its members with news from all over the world. It accomplishes this object in different ways; sometimes directly by means of agents strictly

so called, and at other times by means of contracts through or with other news agencies which themselves directly employ agents for the collection of news. In this way the defendant corporation secures news from all over the world and supplies it to its members.

The fact that the defendant appoints and engages agents in the strict sense of the term only within and for the state of New York is not conclusive proof that its territory for collecting news is limited to that state. The record shows that it performs the purpose of its incorporation, not alone by obtaining news from these so-called agents, but that by virtue of contracts entered into by it with other associations, it contracts to and does receive from them the news which they collect from the principal portions of the civilized world, and in thus contracting for the supply of, and the receiving such news, the association or associations with which such contracts are made, are thereby and for that purpose, and to that extent constituted the agents of the defendant corporation. In that way it is covering a vast territory and it is thereby fulfilling the object of its incorporation—the procuring and supplying its members with telegraphic news.

Through its own agents and by virtue of its contracts with other press associations, the defendant corporation achieves the collection and supplying of news to its members, which has been collected from substantially the same territory over which the United Press Association has collected its news. It is plain that the result is that both associations cover the same territory.

I also think it plain that the United Press Association is organized for a like purpose with the defendant corporation. The plaintiffs controvert this view on the ground, as they allege, that the United Press is organized for a more extended purpose, and this alleged fact is based upon the further allegation that the United Press has agencies for the direct collection of news for it from various parts of the world outside as well as inside the state of New York, while the defendant corporation only has agents for the collection of its news within the state of New York, and all its other news comes to it through contracts with news or press associations or other agencies, and is thus delivered to the defendant corporation. In this view of the two associations I see no difference of purpose. Both are securing news from all parts of the world and such is the object of both. One secures its objects by directly

appointing or employing so-called agents, while the other secures its object by direct agencies in some cases of limited territorial area and in other cases by contracts with other press or news agencies covering a large territory. The purpose of each is the same and the result in each case is the same. Each supplies the news to its members and each has obtained it from a territory bounded only by civilization itself.

The fact that plaintiffs by using the United Press Association are thereby enabled to publish different and more full and complete telegraphic news does not alter the other fact that the two associations are organized as stated for the same purpose, and that they cover the same territory.

2. As to the second question, I think the by-law is valid and enforceable.

The plaintiffs allege that it is beyond the power of the association to enact; that it is unreasonable and oppressive; that it tends and was expressly intended to restrain trade and competition and to create a monopoly; that it is an unlawful interference with vested property rights, and impairs a member's right to contract; that it creates a restriction upon the liberty of the press. None of these objections strikes us as having force. The first ground taken, that it is beyond the power of the company to pass such a by-law, depends for its correctness upon the conclusions arrived at respecting the validity of the other grounds. If the by-law be unreasonable or oppressive, or if it tend improperly to restrain trade and thereby to create a monopoly, or if it be an unlawful interference with a member's right to contract, or if it restrict the liberty of the press, in all or any of these cases the by-law would be beyond the power of the company to adopt or pass, and it would be illegal. The assertion in the moving papers that the by-law tends and was intended to restrain trade, does not in any way affect the question. The court must itself construe the by-law, and must decide as to its tendency, while the intention with which it was passed by those voting for it is entirely immaterial upon this aspect of the case.

We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The

courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England. The cases in this court which are the latest manifestations of the turn in the tide, are cited in the opinion in this case at general term, and are: *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; *Leslie v. Lorillard*, 110 N. Y. 519.

So that when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, What is a restraint of trade in the modern definition of that term? The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that it is not in restraint of trade as the courts now interpret that phrase. Some of the grounds showing the reasonableness of the by-law are well and clearly set forth in the opinion delivered by the learned judge at the general term. Here are a number of persons who are owners of or interested in various newspapers in the state outside of the city of New York. They enter into business relations with each other, to a certain extent, through the form of an organization known as a corporation, and for the purpose, among others, of collecting and supplying themselves with telegraphic news. The greater the number belonging to the organization the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. To suppress competition in such chosen field among themselves, and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other. The division of the business among two or more associations tends directly towards the making of the membership in each less valuable than it otherwise would be, and the membership being less valuable the association itself would tend to decrease in members and to grow less efficient in service and less capable of fulfilling promptly one of the great objects of its existence, the procuring and supplying of news to its members. Thus a by-law of the nature complained

of would have a tendency to strengthen the association, and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business, and must give up all such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done.

It seems to me this by-law is a natural and reasonable restraint upon the members of the association, appropriately regulating their conduct as members thereof with respect to the business which the association was specially organized and incorporated to transact. Its success must greatly depend upon the number of its members, and that in its turn must depend upon the efficiency, reliability, and promptness with which it collects and distributes its news.

This by-law, I think, plainly tends to aid the association in the accomplishment of this object.

As to the objection that the by-law restricts the liberty of the press, I think there is no force whatever to it. For the purpose of efficiently conducting the business of procuring and supplying the news to its members, the association provides that no one of its members shall take or publish news from any other association. In what way the liberty of the press is in the least degree restricted by such by-law, I am unable to see. The constitutional provision regarding the liberty of speech and of the press has nothing whatever to do with such a provision, and no argument can make it plainer than does the reading of the constitutional provision itself.

The ground that the by-law interferes with a vested interest in property, does not appear by these papers.

If the by-law were passed before any member of the association had become a member of the United Press Association, then clearly there would be no interference with vested rights of property in the latter association. The papers do show that the by-law was not passed until subsequent to the time when the United Press Association came into existence, but they do not show that at the time of its passage either or any of the plaintiffs had become members of the United Press Association.

We do not, therefore, intend to decide in this case as it now

stands that one who had already and legally become a member of the United Press Association before the passage of the by-law in question, could thereby be unfavorably affected in the assertion of his right of membership in the United Press Association, or placed in the position of availing himself of its privileges at the risk of suspension or expulsion from the association adopting the by-law.

A by-law which disturbs a vested right may not be valid: *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 182, 183; 1 Morawetz on Corporations, sec. 496; and although a corporation may have the power to adopt by-laws, yet one of its members who acts upon a subject not touched by any by-law might perhaps claim that a subsequent by-law upon the subject, which if valid as to him, would practically render valueless a portion of his property, should not as to him be so treated or regarded: See also *Wynhamer v. People*, 13 N. Y. 378. We do not decide this proposition for the reason that it is not before us.

The grounds in opposition to the by-law, which have been discussed, we think are unavailing, and the orders of the general term reversing the orders refusing to dissolve the injunction should be affirmed, with costs.

All concur.

CORPORATIONS. — BY-LAWS, VALIDITY AND CONSTRUCTION OF: See note to *Sayre v. Louisville etc. Ass'n*, 85 Am. Dec. 617-622, a case which declares that a corporation can make no rule contrary to law, good morals, or public policy. A later case to the point that a by-law must be reasonable and general is *Budd v. Multnomah etc. R'y Co.*, 15 Or. 413; 3 Am. St. Rep. 169.

CONTRACTS IN RESTRAINT OF TRADE, WHEN REASONABLE AND VALID: See notes to *Callahan v. Donnolly*, 13 Am. Rep. 173-176; *Smalley v. Greene*, 35 Am. Rep. 269-272; *Tardy v. Creasy*, 59 Am. Rep. 686-693; *Pike v. Thomas*, 7 Am. Dec. 743-746; *Angier v. Webber*, 92 Am. Dec. 751-765. In *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, the principle announced was that such contracts are valid, if they impose no restraint upon one party not beneficial to the other, and are induced by a consideration which makes it reasonable for the parties to enter into them.

TAYLOR v. GRANITE STATE PROVIDENT ASS'N.

[136 NEW YORK, 343.]

CORPORATIONS. — JURISDICTION OVER A FOREIGN CORPORATION cannot be obtained by service of process upon a person who is not its cashier, director, nor managing agent.

CORPORATIONS. — THE MANAGING AGENT OF A FOREIGN CORPORATION upon whom service of process against it may be made must be some person invested by it with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it. The relation of attorney and client does not constitute the attorney the managing agent upon whom process against the client may be served.

A JUDGMENT SHOULD BE VACATED ON MOTION when it is against a foreign corporation, and is based upon service of process upon a person who is shown by affidavits not to have been its cashier, director, nor managing agent.

Edward Hassett, for the appellants.

Alpheus T. Bulkley, for the respondent.

O'BRIEN, J. The defendant moved to set aside the judgment entered against it in this action and the service of the summons, on the ground that no jurisdiction was obtained of the person of defendant, as no sufficient or legal service of process had ever been made upon it. The motion was denied and the defendant then moved for a resettlement of the order which was refused. Orders were entered upon both motions from which an appeal was taken and they were affirmed at general term. The order denying the motion for resettlement was so far a matter of discretion that it is not reviewable here but the denial of the motion to vacate the judgment and set aside the service of the summons presents a question of law, and we have jurisdiction to review it.

The defendant is a foreign corporation organized and existing under the laws of the state of New Hampshire and has never appointed an agent in this state for the purpose of receiving service of process. It appears from an affidavit attached to the summons that it was served upon one John M. Townsend, an attorney at law, residing in Poughkeepsie, on the 30th of December, 1891. The cause of action arose and the venue was laid in Dutchess County. The defendant did not appear in the action, but other defendants residing in that county did, and upon their answers a trial was had and judgment entered against all, including this defendant, against

which the main relief was demanded. The action was one calling for equitable relief, and the judge who tried it at the special term found as a fact that the process was served upon a managing agent of the defendant, upon what proof does not appear, and he proceeded to render judgment against the defendant for the relief demanded in the plaintiff's complaint. There is also attached to the judgment roll an affidavit of the plaintiff's attorney, in which it is stated, among other things, that the summons was served upon Townsend, and that he was at that time acting as the defendant's managing agent or cashier, that more than twenty days had elapsed since the service and no appearance had been made.

The moving papers contain the affidavit of the defendant's president, in which he swears that Townsend never was an agent, cashier, or director, or connected with the defendant in any way except as attorney of record in a suit to foreclose a mortgage held by defendant against the plaintiff. Townsend himself swears in the most positive way to the same fact, as does also the defendant's superintendent of agents. The latter goes farther and swears that in November, 1889, one Pells and another were appointed agents for defendant in the county of Dutchess and five other counties in the vicinity, and that no subsequent appointment had been made, and Pells himself swears to the same fact and further that the defendant never had any other agent in the territory, and that Townsend never was such agent. The plaintiff produced and read various affidavits in opposition to the motion in which numerous acts on the part of Townsend are detailed that might tend to show, in the absence of explanation, that he was such an agent as is designated in the code upon whom process could be served, but after careful examination of these affidavits, we think that the acts described are consistent with the relation of attorney and client, which relation it is admitted by the defendant's officers existed and still exists, and that they really do not establish any other relation. The affidavits, or some of them, also contain positive statements to the effect that Townsend was, at the time of the service of the summons, a managing agent or cashier of the defendant, but as the persons making the statements could not possibly know the fact they must be regarded as mere expressions of opinion which cannot overcome the clear and positive statements of the defendant's officers who had knowledge of the facts. Where there is conflicting evidence with respect to a disputed fact

arising upon a motion, it is the province of the court in which the motion was made to settle the conflict, and this court will not interfere with the result; but when the moving affidavits in this case are analyzed and properly construed, they present no real conflict with the positive proof of the defendant as to the real relations that Townsend held to the corporation when the process was served upon him. The court did not obtain jurisdiction of the defendant by the service of process upon Townsend unless he was within the meaning of section 432 of the code, "the cashier, a director, or a managing agent of the corporation, within this state." A managing agent must be some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it: *Reddington v. Mariposa L. and M. Co.*, 19 Hun, 405; *Sterrett v. Denver etc. R. R. Co.*, 17 Hun, 316. The relation of attorney and client, which is all that appears to have existed in this case when the process was served, does not constitute such an agency as is designated in the provisions of the code referred to, and hence no jurisdiction of the defendant's person was obtained by the service made.

That part of the order appealed from, which affirmed the order denying the motion to set aside the service of the summons and to vacate the judgment, should be reversed, and the service set aside and the judgment vacated, and the appeal from that part of the order which affirmed the order denying the motion for a resettlement should be dismissed, without costs to either party in this court.

All concur.

FOREIGN CORPORATIONS — PROCESS, ON WHOM MUST BE SERVED. — Service of process on a foreign corporation, according to the California code, must be made upon its managing agent or cashier, and a clerk in its store is not a managing agent or cashier, although he has the custody of moneys belonging to the corporations: *Blanc v. Paymaster Min. Co.*, 95 Cal. 524; 29 Am. St. Rep. 149, and note, with cases collected. See extended note to *Hampson v. Weare*, 66 Am. Dec. 121.

WALRADT v. PHENIX INSURANCE COMPANY.

[136 NEW YORK, 375.]

INSURANCE — CHANGE OF INTEREST. — THE ISSUING OF AN EXECUTION AND ITS LEVY UPON PERSONAL PROPERTY do not constitute such a change in the interest, title, or possession of the assured as avoids the policy under a condition declaring that it shall be void if any change other than by the death of the assured takes place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise.

A. H. Sawyer, for the appellant.

C. W. Thompson, for the respondent.

O'BRIEN, J. The payment of the loss in this case is resisted by the insurance company upon the ground that there was a breach of one of the conditions of the policy, upon which its liability depended. The question upon which the case turns is the construction and effect to be given to the following condition, constituting a part of the contract:—

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, etc., . . . ; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."

We agree with the learned counsel for the defendant that such a condition in a contract of insurance must be construed fairly and in accordance with what appears or must be presumed to have been the intention of the parties. The subject of the insurance was a stock of goods described as then in a brick store in the village of Theresa, New York. The property was destroyed by fire, which occurred about twelve o'clock on the night of April 4, 1890. Nearly two months before the fire a judgment was recovered against the insured, who was the plaintiff's assignor, and on April 2, 1890. an execution was issued upon the judgment to the sheriff of the county, and delivered to him the next day. On April 4th, the day following, the sheriff went to the store of the insured and demanded payment of the amount of the execution, and payment not being made, he levied upon all the goods, which at the trial were shown to have been worth about eleven thousand dollars, and the sum due upon the execution was something over one thousand dollars. Some discussion appears to

have been had in the courts below in regard to the question whether what was done by the sheriff amounted to a legal levy upon the property, but a correct conclusion seems to have been reached in that respect, as it appears that he procured the key of the store, and took what at least amounted to a symbolical possession, at the same time making a minute of the levy upon his book. The day after the fire the insured made a general assignment to the plaintiff for the benefit of creditors. The defendant insists that, upon these facts, there was such a change of interest and change of the possession as avoids the policy, within the meaning of the above conditions. If there was a change of interest, within the meaning of the policy, that result was produced by the delivery of the execution to the sheriff, as the goods of the debtor are bound from that time: Code, sec. 1405. The levy was not necessary to work such change, and the only effect it had was to change the possession. We must first determine what the parties to the contract intended when they made use of the terms "change in the interest, title, or possession of the subject of insurance." The interest which a person may have in property is affected in many ways without producing a change in such interest, as that term is generally understood; when he contracts a debt or incurs an obligation, this, in a broad sense, may affect such interest, as the property constitutes the means of payment, and his pecuniary condition, in a general sense, depends upon what he has left after discharging all his debts and obligations. The debt assumes another form by the recovery of a judgment, and the execution is the process which, when delivered to the officer, clothes him with authority to enforce the collection of the debt. That is the foundation of all the subsequent steps, and while each event in the progress of proceedings for collection may bring the debtor and creditor into closer relations, and press nearer upon the property of the debtor, yet his title or interest in the property is not divested or transferred until a sale is made, which operates in law to transfer his interest to another. By the delivery of the execution and the levy thereunder the officer has simply obtained authority, at some future time and in the mode prescribed by law, to expose the property of the debtor for sale, and that is the final act which changes the title and interest of the debtor. The officer has, no doubt, in law and from the necessity of the case, a sufficient interest in the property levied upon to enable him to

protect it by insurance or against the acts of wrong-doers, otherwise the proceedings for collection of the debt might be defeated, but still the owner retains the title in the same sense that he did after he made default in the payment of the debt, which, as we have seen, is the basis of every step in the process of enforcement. His interest is, no doubt, affected by the issuing of the execution and the levy, but that is also true, though perhaps in a more remote sense, by contracting the debt. The words "change of interest," as used in the policy, are substantially synonymous with the words "change of title," and neither event occurs until the sale upon the execution. It may be asked what effect is under such construction to be given to the word "interest," as used in the condition. It must be borne in mind that the standard policy now in use is so framed as to contain words suitable and applicable to every subject of insurance, but all the provisions are not necessarily applicable in every case. That must always be so whenever a contract in the same form and expressed in the same language is sought to be applied to different things or to different classes of property. The subject of insurance, its condition and situation, and the surrounding circumstances may vary so as to render words and phrases contained in the policy not strictly applicable. There is a large class of risks, however, to which the word "interest," as used in the condition under consideration, is, no doubt, applicable. Policies are frequently written in favor of parties who have a claim upon property in the nature of a lien to secure the payment of a debt, and perhaps for other purposes.

When the debt is paid or transferred, the interest of the insured in the subject of insurance is changed, and the indemnity of the policy cannot inure to the benefit of another in the absence of express provision or consent of the company. In such cases the word can have full effect and a perfectly natural and appropriate application. It is manifest that the parties to this contract knew and intended that in some respects the interest of the insured in the property covered by the insurance would be changing from day to day. The insured was a country merchant who, after he had effected the insurance, was at liberty to carry on trade in the goods, to buy and sell and contract debts as before, and, under such circumstances, to say that whenever an execution was delivered to the sheriff, or even the town constable, for any sum, no matter how insignificant, the policy was thereby avoided,

would be to give to this condition a very harsh and narrow construction, and one which, it seems to me, was never within the contemplation of the parties. The fair and reasonable construction which we are bound to give to the contract does not require us to go so far as that: *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 356; 28 Am. St. Rep. 645. There are cases where it has been held that the recovery of a judgment and the levy of an execution avoided a policy, but that was in consequence of an express provision to that effect in the policy. These provisions have been omitted from this policy, and the same result cannot be accomplished by a condition against a change of interest.

That there was no such change of interest in this case, as is fairly contemplated by the policy, has been conclusively settled against the defendant's contention by a decision of this court. In *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517, the policy contained a condition rendering it void "if the interest of the insured be changed in any manner, whether by act of the insured or by operation of law." The subject of the insurance was real property, and a mechanics' lien had been filed and took effect thereon within the life of the policy and before the loss. It was urged by the defendant that there could be no recovery in the case, for the reason that there was a breach of the condition against any change of interest. Judge Rapallo, giving the opinion of the court, disposed of the question in a single sentence, in which he said: "The notice filed in pursuance of the mechanics' lien law clearly did not affect any change of interest in the property insured," and the plaintiff recovered. I am unable to perceive that there is any satisfactory distinction to be made between the filing of a mechanic's lien upon real estate and the delivery of an execution against personal property, followed by a levy. So that upon authority and reasonable construction as to the intention of the parties there was no change of interest in the case at bar: *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Browning v. Home Ins. Co.*, 71 N. Y. 508; 27 Am. Rep. 86.

The change of possession produced by the levy and the action of the sheriff remains to be considered. The policy is not avoided, by the terms of the condition referred to, by every change of possession that may take place in the property. A change of occupants without increasing the hazard is excepted from the operation of the condition, and does not invalidate the insurance. The learned counsel for the defend-

ant argues that the exception in the condition does not apply when personal property is the subject of the insurance, and does not apply in this case, as there cannot be an occupant of goods in a store consistent with the ordinary and appropriate use of language. The general term has shown that the word "occupant" is sometimes used with reference to personal property. When the subject of insurance is a ship, a building not attached to the soil, so as to become part of the realty, or other things of like character, the term "change of occupants" would be appropriate. When it is used in reference to goods in a store its fitness is not so apparent; but as the words of the policy were used to meet all cases, we have no right to say that the exception in the condition was not designed to apply when goods were the subject of insurance merely because the term "change of occupants" does not seem to be the most natural and appropriate. A large part of the contracts of insurance now entered into relate to personal property, and to hold that such an important exception as that now under consideration to the broad terms of a condition had no application to such contracts would make the rights of the parties turn upon the literal meaning of a word. What the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous. A change in the possession of a store of goods must, moreover, refer to the place where the goods are situated. In this case they are described as situated in a brick store. The place where the goods were kept, though not the subject of insurance, was an important element in the risk, and it was natural and proper for the parties to provide against a more hazardous change in the occupancy of that place, and hence the parties agreed that in case the possession of the goods changed, that fact alone would not avoid the policy unless the occupancy of the place where they were was also changed in such a manner as to become more hazardous. In this way the words of the exception can be given their ordinary and natural meaning, and the exception itself can have effect. It is only in a plain case that we are warranted in saying that the parties have used language not intended to have any application to the subject-matter of the contract. Whether the change of possession that was shown in this case, followed by a change of occupants, was or was not more hazardous depended upon the circumstances shown, and presented a ques-

tion of fact, which the learned trial judge properly submitted to the jury, and was determined in favor of the plaintiff. While the act of 1886 (chapter 486) makes the use of uniform policies by insurance companies compulsory, the state did not assume to dictate its form; that was left to the underwriters themselves, and it must be assumed that they used words and phrases in conditions with reference to the previous decisions of the courts in respect to their meaning and effect, and when they used the expression "change of interest," they must have had in mind the fact that this court had held that the filing of a mechanic's lien did not work such change; and therefore it is reasonable to assume that it was understood that the lien acquired by a levy upon goods under an execution would have no such effect. So, also, the conditions with respect to change of possession had been frequently construed, and it had been held that the transfer of an interest by one partner to another, or the appointment of a receiver of partnership property in an action to dissolve the partnership, and other acts of the insured in regard to the subject of the insurance, did not produce such a change within the meaning of conditions substantially like the one in this case: *Keeney v. Home Ins. Co.*, 71 N. Y. 396; 27 Am. Rep. 60; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337; *Browning v. Home Ins. Co.*, 71 N. Y. 509; 27 Am. Rep. 86; *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380; *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68; *Hennessy v. Manhattan Fire Ins. Co.*, 23 Hun, 98.

While the provisions of the contract are not to receive a harsh or narrow construction against either the insurer or insured, still the question must be solved by an application of the principles which courts have applied in analogous cases. There is an exception in the case to the ruling of the learned trial judge that the forfeiture of the policy, if any, might be considered as waived by the defendant in receiving notice and proofs of loss without objection, after knowledge of all the facts. No question of that kind seems to have been submitted to the jury, as they were allowed to pass upon but one question, namely, whether the hazard was increased by the change of possession; but as we are of opinion that there was no breach of the conditions, and that whatever was said upon the subject of waiver by the trial judge was upon the assumption that there was or might have been such breach and a consequent forfeiture, the ruling is now immaterial. The

other questions in the case present no ground for reversal, and were correctly disposed of in the courts below.

The judgment should be affirmed.

All concur except EARL, PECKHAM, and GRAY, JJ., dissenting.

INSURANCE — CONDITION AGAINST ALIENATION — EXECUTION. — A levy of execution on insured property is not an alienation avoiding the insurance where a right of redemption still remains in the assured: *Clark v. New England etc. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44. Insurers are not discharged by the levy upon goods which are locked in the house wherein they are found by the sheriff: *Franklin etc. Ins. Co. v. Findlay*, 6 Whart. 483; 37 Am. Dec. 430. As to the effect upon insurance policies of alienation by operation of law, see note to *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 158, where the cases discussing this subject are collected. A condition in a policy against encumbering the property insured is regarded as relating only to liens placed voluntarily upon the property, and not those created by law, such as judgments: *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and note. See *Commercial etc. Ass. Co. v. Scammon*, 126 Ill. 355, 9 Am. St. Rep. 607, where a clause in an insurance policy against alienation by judicial decree is construed.

READ v. MARINE BANK.

[136 NEW YORK, 454.]

NEGOTIABLE INSTRUMENTS HELD ADVERSELY TO PLAINTIFF. — One to whom certificates of deposit have been issued, payable to his order, cannot recover thereon while they are in the possession of a stranger to the action who claims an interest therein, and against whom it is possible for the plaintiff to maintain an independent action to determine such claim or to recover possession of such certificates.

LOST NEGOTIABLE PAPER, WHAT IS NOT. — A statute authorizing a recovery upon lost negotiable paper, if indemnity is given, does not apply to a case in which it appears that the paper is not lost, but is in the possession of a stranger to the action claiming an adverse interest therein.

NEGOTIABLE INSTRUMENTS. — IF AN ADVERSE CLAIM IS MADE to negotiable instruments which are in the possession of a stranger to the action, the court cannot, by bringing such stranger before it as a witness and requiring him to produce the instruments and deposit and leave them with the clerk, give the plaintiff a right to recover thereon. Notwithstanding such deposit, they are still constructively in the possession of the witness and held adversely to the plaintiff.

ACTION upon two certificates of deposit issued by the defendant to the plaintiff and payable to his order. They had never been presented to the defendant for payment, for the reason that they were in the possession of one Rockwell, who claimed to hold them in his official capacity as executor of the estate of the plaintiff's sister.

Benjamin H. Williams, for the appellant.

O. O. Cottle, for the respondent.

MAYNARD, J. The certificates, which the plaintiff received from the defendant, when he deposited the moneys, which he seeks to recover in this action, possessed the attributes of negotiable paper, and were transferable in the same manner. Construing the defendant's contract according to the rules of commercial law, it was not bound to pay the deposit, except upon the production and surrender of the certificates properly indorsed. When the action was brought and tried, the plaintiff was unable to comply with the implied stipulation in his contract with the defendant, which required a tender of the certificates before payment could be exacted; but performance of an impossible thing was not demanded, and the law imported into the contract an exception, that if the paper had been actually lost, and he did not know, and could not reasonably be expected to ascertain where it was, or, if knowing of its existence, it was beyond his power to reclaim it by any lawful method of procedure, the defendant would not be discharged from liability, but a recovery could be had by making substantial indemnity at the trial. The plaintiff's embarrassment is due to his inability to establish his *status* as the owner of lost negotiable paper. It appears from the undisputed evidence that these certificates are not lost in the legal signification of the term. They were received by the plaintiff at a time, when his sister was living with him, and it is alleged in the answer, and some proof was offered and excluded to show that they then held their property in common, and that she had an interest in the moneys deposited. Upon a subsequent separation growing out of family differences she took the certificates away with her, and claimed, that in making the deposit her brother had acted as her agent, and that they rightfully belonged to her. Whether this claim was meritorious or fabricated was of no concern to the defendant, and cannot affect the determination of its rights. They may have in fact been abstracted from the custody of the plaintiff by the commission of a larceny, and if he knew where they were, and by the exercise of superior diligence could have recovered their possession, he cannot impose upon the maker the risk of a litigation with a stranger, involving the question of ownership, in which the possession of the certificates would be some evidence to support a claim of title.

The plaintiff appears to have taken this view of the obligation of the parties, for in 1885 he brought an action against the sister to recover the possession of the certificates, upon the trial of which she produced them before the referee, but no decision had been reached when the action abated by her death. Her will was probated after a contest, and letters testamentary issued to her husband, and the certificates passed into his possession, and he claimed to hold them as the representative of her estate, and gave the defendant notice of his claim. The decree of probate was reversed upon appeal and the authority of the executor suspended, and a new trial at the circuit ordered which had not occurred when this action was brought. Upon these facts the case is not distinguishable from *Van Alstyne v. Commercial Bank*, 4 Abb. App. 449. The suit there was to recover the amount of a draft alleged to have been lost, but shown upon the trial to be in the possession of a bank in West Virginia, who had obtained it by means of the forged indorsement of the payee, and who refused to deliver it to the plaintiff. A recovery was denied, although it appeared that the paper was beyond the jurisdiction of the courts of this state; and it was held that the plaintiff was bound to resort to the courts of the foreign jurisdiction, or to the federal tribunals, which were open to him, to recover possession of the instrument, if it was wrongfully withheld, and place himself in a position, where he could surrender it to the bank, before he could compel it to part with the money represented by the absent draft. It is there stated that exhaustive research has failed to find any reported case, or any statement in any treatise upon the subject, which sustains the proposition that payment can be required under such circumstances.

There were no insuperable difficulties in the way of the plaintiff's recovery of these certificates. His action for that purpose against the sister could have been revived and continued after her death by the substitution of the executor as the defendant, or if his authority was suspended during the contest over the will, a temporary administrator could have been appointed and made the party defendant. A still more direct and effective remedy was within the plaintiff's reach. He might have brought an action against the sister and the bank joining them as parties defendant in the same action, and demanding judgment that she be required to surrender the certificates to the bank, and that upon such surrender the

latter be required to pay the amount of them to the plaintiff. Such an action is proper when the surrender of the instrument is a condition of the right to enforce payment, and the paper is in possession of a wrong-doer, who refuses to deliver it to the payee, and the maker admits his liability to pay upon receipt of the evidence of his obligation: *Thomas v. Thomas*, 131 N. Y. 208; 27 Am. St. Rep. 582. In such a controversy the defendant bank could have stood indifferent, and could have protected itself, even against a liability for costs, by paying the money into court, and abiding its decision as to the lawful ownership of it. Even granting that the plaintiff's right to bring or prosecute an action in either form was held in abeyance during the pendency of the contest over the will, it would not afford a sufficient reason for the maintenance of an action meanwhile against the bank alone. The inconvenience, if any, resulting from the situation, must be borne by the plaintiff, and cannot be cast upon the defendant, who was in no wise responsible for the safe-keeping of the certificates by the plaintiff.

The provisions of the code, sec. 1917, authorizing a recovery upon lost negotiable paper, if indemnity is given, do not relieve the plaintiff of his difficulty. A bond is not required or authorized as a condition precedent to the right to bring suit, but if it appears upon the trial that the instrument is lost, the plaintiff may still recover upon executing the required undertaking to be approved by the trial judge. Here the loss of the paper was not shown at the trial, but the contrary affirmatively appeared, for the certificates were present in court, having been produced by the executor under a subpoena *duces*. The action of the court in summarily depriving the witness of the custody of the certificates, and impounding them pursuant to its direction, cannot affect the legal rights of the parties. They are still constructively in the possession of the executor, and the order of the court requiring him to deposit them with the clerk cannot be made to perform the functions of a judgment and execution in an action of replevin.

This appeal was twice argued at the general term. Upon the first argument, the judgment was reversed for substantially the same reasons we have here given. Subsequently the plaintiff's case against the Bank of Attica, depending upon a certificate like those here involved, and taken from him by his sister under similar circumstances, was decided in his

favor by this court in the second division: *Read v. Bank of Attica*, 124 N. Y. 671. A re-argument was thereupon ordered by the general term, because it was claimed that the decision in that case was controlling. Upon the second argument it was held that the *Bank of Attica* case conclusively established plaintiff's right to recover, and the judgment at the circuit was affirmed. A careful examination of the record in *Read v. Bank of Attica*, 124 N. Y. 671, fails to show that it is in any respect decisive of the important questions presented upon this appeal. There were but two exceptions taken in the course of the trial, one to the exclusion of evidence, which was inadmissible under the pleadings, and the other to the direction of a verdict for the plaintiff. The latter exception was not well founded, for upon the proofs the plaintiff was entitled to recover. The defendant conceded that there was no question of fact for the jury, and it did not ask for the direction of a verdict in its own favor. All the material testimony was given by the plaintiff himself, who, it seems, had the certificate in his possession when upon the witness stand, although it had been brought into court by the executor under a subpœna. The plaintiff testified to the deposit of the money, and the issue of the certificate, which was then read in evidence. Its non-payment was not disputed. The plaintiff's case was then fully established, and he was entitled to the direction of a verdict.

It is true that it also appeared from the plaintiff's testimony that the certificate had been taken by his sister, and that she had promised to return it, which was a recognition of his title, and the production of the certificate by the executor in court, and the delivery of it to the plaintiff, were facts from which the inference might be drawn that his possession was in subordination to the plaintiff's title, and not in hostility to it, in the absence of evidence of a claim of title on his part. We have here an entirely different record. The plaintiff called the executor as a witness, who testified that he had the certificates in his possession, but declined to produce them, unless directed to do so by the court, which direction was given, but it was entered upon the minutes that he did not produce them as the property of the plaintiff. The certificates were then offered in evidence, and objected to on the ground that plaintiff was not in possession of them, and could not surrender them upon their payment. The objection was overruled and an exception taken.

The executor further testified that he had been in possession of the certificates since June, 1887; that he received them from his wife; that she produced them before the referee in 1886, in the action brought by plaintiff against her, who then made copies of them; that she took them away, and upon her death they came into his hands as her executor; that he had held them ever since, and was not willing to surrender them to the defendant, if payment should be made to the plaintiff. The plaintiff testified that he had never sold or transferred the certificates to anybody; that they were taken away by his sister without his knowledge or consent; that he had requested her to bring them back, and she had not done so; that he had commenced an action against her to recover their possession, which was undetermined; that he had never presented them or either of them for payment, and that they were not in his possession.

The defendant moved for a nonsuit upon the grounds that the certificates had never been presented to the bank indorsed for payment; that it affirmatively appeared that they were not in plaintiff's hands or in his possession; that they are negotiable paper, and an action cannot be maintained on such paper, unless the plaintiff has the power and is able to bring the paper into court and surrender it; that they appear to be held by parties claiming under an adverse title to the plaintiff, and that the plaintiff had not established a cause of action. The motion was denied, and an exception taken. The features of the case were not changed by the defendant's testimony, and at the conclusion of the evidence the court was asked to direct a verdict for the defendant upon the grounds specified in the motion for a nonsuit, which was refused, and an exception noted, and the court directed a verdict for the plaintiff, which was also excepted to.

The question was thus sharply presented upon this trial, which is not in the record in the Bank of Attica case, whether the payee of commercial paper, who has not the possession of it, and who confesses his inability to surrender it on payment can recover against the maker, when it appears by his own showing that the paper is not lost, but is in the hands of another, although wrongfully, who produces it at the trial, but refuses to surrender it, and claims title to it in hostility to the payee. We do not think a recovery can be had under such circumstances. To hold otherwise would require us to overrule the decision of this court in *Van Alstyne v. Commercial*

Bank, 4 Abb. App. 449, and to establish a dangerous precedent in the administration of the law merchant. This question is not discussed in the opinion of the general term in the *Bank of Attica* case, and the second division merely declared its assent to the views of the court below, with the exception of the allowance of interest, and we are therefore not concluded by the decision there made.

The order and judgment must be reversed, and a new trial granted, with costs to abide the event.

All concur.

NEGOTIABLE INSTRUMENTS — NECESSITY OF POSSESSION TO MAINTAIN ACTION ON. — The legal holder of a note may maintain an action on it, though he has disposed of his interest in it, if he has not transferred it: *Thompson v. Cartwright*, 1 Tex. 87; 46 Am. Dec. 95, and note. The payee of a promissory note may sue on it, and recover in his name if he is in possession of it, though he may have erased his own and subsequent indorsements thereon: *Collins v. Panhandle Nat. Bank*, 75 Tex. 254.

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HAILEY v. ANO.

[136 NEW YORK, 569.]

JUDGMENTS — ESTOPPEL. — IF AN ACTION OF TRESPASS, *quare clausum fregit* upon the issue of soil and freehold, a verdict and judgment is entered on that issue, the title as between the parties, at the time of the alleged trespass, is determined and the judgment is conclusive between them in a subsequent action of trespass or of ejectment.

LIS PENDENS. — THOUGH AN ACTION FOR TRESPASS UPON REAL PROPERTY is pending and the pleadings are such that the title to the property may be drawn in issue and so decided that the decision will be conclusive on the parties in a subsequent action of trespass or of ejectment, yet as the land itself is not the subject-matter of the action and there is nothing in the pleadings to show that title thereto is involved, the purchaser of it *pendente lite* is not bound by the judgment in a subsequent action involving title to the same land.

JUDGMENT IN TRESPASS, EFFECT OF ON PURCHASER PENDENTE LITE. — The pendency of a trespass suit does not prevent the purchase of the land upon which the trespass was committed, *pendente lite*, or give a judgment for damages subsequently recovered therein the effect of an adjudication upon the title of such intermediate purchaser, even though he may have known that the action was for trespass upon the land purchased.

J. P. Kellas, for the appellant.

S. S. Wheeler, for the respondent.

ANDREWS, C. J. This is an action of trespass. The complaint alleged an unlawful entry by the defendant upon lands

of the plaintiff, on lot 20, Franklin County, in 1889, and the cutting and carrying away hay therefrom, and demanded damages in the sum of two hundred dollars. The answer contained a general denial of the complaint, and alleged that the defendant was the owner of the land upon which the alleged trespass was committed, and had a right to cut and carry away the grass. The action was originally commenced in justices' court, and on plea of title being interposed, the action there was discontinued and a new action for the same cause was brought in the supreme court.

The contest on the trial turned on the true location of the line between lots 19 and 20. It appeared that plaintiff had been in possession of lot 20 for more than twenty years, and that in 1882 he took a contract of purchase from the owner, under which he held possession at the time of the alleged trespass. The defendant is the wife of Francis Ano, who, in 1880, went into possession of eighty acres of lot 19, adjoining lot 20, under, as may be inferred, a contract of purchase from one John Rowley, the owner, who, on the tenth day of June, 1885, conveyed the eighty acres to Francis. On the 20th of July, 1885, Francis Ano and his wife conveyed forty acres of the land to their daughter Lena, and forty acres to their son Joseph, but upon what consideration the record is silent. In 1889, Lena and Joseph conveyed the land to their mother Sophia Ano, the defendant. The hay cut by the defendant in 1889 was cut from about six acres of land either on lot 20 or on lot 19, the question from which lot it was taken depending upon the true location of the line between the respective lots. Evidence was given in support of the claim of each party as to the true location of the line.

The question on this appeal relates to the correctness of the ruling of the trial judge, that a certain judgment rendered in a former action brought by the present plaintiff against Francis Ano, concluded the question of title to the six acres in the present action. The trial judge directed a verdict for the plaintiff in this action on the ground that the judgment in the former action was a conclusive adjudication as against the present defendant, Sophia Ano, upon the question of title.

For a proper understanding of the question presented, some facts need to be stated. The former action was brought in the supreme court in 1884. The plaintiff, in his complaint, alleged that the defendant, Francis Ano, in July and August of that year wrongfully entered upon premises owned and oc-

cupied by the plaintiff on "lot 20," county of Franklin, and took therefrom a quantity of hay, the property of the plaintiff, of the value of two hundred dollars, and converted it to his own use, wherefore the plaintiff demands judgment for that sum, etc. The defendant, Francis Ano, answered by a general denial, and set up that at the time complained of he was the owner and in possession of the lands from which the hay was taken, and was the owner of the hay. The answer is under date of October 10, 1884. No judgment was entered until November, 1888. It appears from the recitals in the judgment, that at the November term of the court in that year the cause being on the calendar was moved for trial by the plaintiff, and that the attorneys for the parties thereupon agreed in open court that the plaintiff have judgment on the merits for forty dollars damages and costs, and it was so adjudged. It will be observed that when the former action was commenced, neither party thereto had the legal title to any land on lots 19 and 20. Both were in possession of the land occupied by them under contracts with the respective owners. After the commencement of the former action, Francis Ano, the defendant, obtained a deed of the eighty acres on lot 19, his deed being dated June 10, 1885. The plaintiff, so far as appears, has never obtained a deed of lot 20. It is also important to notice that the judgment in the former action was rendered three years after Francis Ano had conveyed the eighty acres to his children. It does not appear that when they took their deeds they had any knowledge of the pendency of the suit against Francis Ano. The deed to the present defendant was given after the rendition of the judgment.

We shall assume in determining the question now presented that the controversy in the former suit related to the same indential premises which are involved in the present controversy. It is settled in this state that under an issue of soil and freehold in an action of trespass *quare clausum fregit*, the verdict and judgment on that issue determines the title as between the parties at the time of the alleged trespass, and that in a subsequent action of trespass between the same parties, where the same title is put in issue, the former judgment is conclusive: *Burt v. Stearnburgh*, 4 Cow. 559; 15 Am. Dec. 402. The same rule obtains when the second action is ejectment: *Dunckle v. Wiles*, 5 Denio, 296. If the title existing in either party when the former judgment was obtained was determined before the second action, or a new title had

been acquired by the party against whom the judgment was rendered, this may be shown in avoidance of the estoppel of the former judgment: *Dawley v. Brown*, 79 N. Y. 390. The rule that estoppels bind parties and privies would, we suppose, affect a grantee of a party to the judgment in the trespass suit who acquired title from such party after the judgment. In *Dunkle v. Wiles*, 5 Denio, 296, which was ejectment, where the defendant relied upon a judgment in a former action of trespass between his grantor and the plaintiff as an adjudication upon the title, it was held that the defendant was entitled to the same benefit from the former judgment as his grantor would have been if he had been the defendant. If this is a correct principle, it would seem that the converse of the proposition is also true, viz., that a subsequent grantee would be bound by a former judgment in trespass on the question of title against his grantor.

But the circumstances of the present case present a very different question. When Francis Ano conveyed the eighty acres to his children, the first action was pending; but there was no judgment, and consequently at the time no estoppel, since obviously the estoppel by verdict and judgment can only arise when these events have transpired. The point to be determined is whether, having purchased *pendente lite*, they were bound by the judgment subsequently rendered. We have been unable to find any authority in support of the proposition that the purchaser of land pending a suit in trespass between the grantor and another, in which the issue of title has been made, takes subject to the judgment which may be subsequently rendered in that action, or that he will be concluded thereby. The doctrine of the common law that in case of an alienation pending a real action the alienee takes subject to the judgment which may be rendered therein, which doctrine was adopted by courts of equity in analogous cases, though it often operated with great hardship, was founded upon a definite policy. It is clearly set forth in *Gaskell v. Durdin*, 2 Ball & B. 167: "The rule of the court undoubtedly is, that any interest acquired in the subject-matter of a suit pending the suit, is so far considered a nullity that it cannot avail against the plaintiff's title; and if this rule were not attended to, there would be no end of any suit; the justice of the court would be evaded, and great hardship and inconvenience to the suitor necessarily intervene"; and in *Hopkins v. McLaren*, 4 Cow. 678, Senator Col-

den stated the reason of the rule to be, that "if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end of litigation; for as soon as a new party was brought in, he might transfer to another and render it necessary to bring that other before the court, so that a suit might be interminable": See also *Murray v. Lylburn*, 2 Johns. Ch. 444; *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656. The frequent hardship resulting from the rule of *lis pendens*, without any provision requiring notice to be filed, led to statutory enactments on the subject requiring notice of *lis pendens* to be filed in certain actions, and making the commencement of an action constructive notice only from the time of such filing: *Sheridan v. Andrews*, 49 N. Y. 478, and statutes cited. Section 1670 of the Code of Civil Procedure, which is in substance a re-enactment of former statutes, authorizes a notice of *lis pendens* to be filed in an action "brought to recover a judgment affecting the title to or the possession, use, or enjoyment of real property." An action for damages for trespass on real property is not within this section. The object of the action is the recovery of damages, and the title of the premises upon which the trespass was committed may or may not be affected or involved in the litigation. The action is not brought to procure a judgment affecting the title or possession of the land, although the judgment may, in certain cases, be evidence of title.

The contention is, that notwithstanding the action of trespass is not one wherein notice of *lis pendens* can be filed, yet a purchaser *pendente lite* must take notice at his peril of a pending action of trespass to which his grantor is a party, and that the doctrine of *lis pendens*, as formerly understood before there was any statutory regulation, applies; but the case is not within the principle upon which that doctrine was based. The purchase of the land from a defendant against whom an action for trespass is pending, does not affect the plaintiff's claim or right of action. He can recover his damages as if no sale of the land had been made, and his remedy can be pursued unimpaired by the transfer of the land. The transfer is productive of none of the consequences which the doctrine of *lis pendens* was intended to prevent. That doctrine prevented the acquisition *pendente lite* of an interest in the "subject-matter" of the suit, to the prejudice of the plaintiff, because otherwise (in words already quoted) "there would be no end of any suit; the justice of the court would be evaded

and great hardship and inconvenience to the suitor would be necessarily introduced."

The grantees of Francis Ano acquired by the deed no interest in the "subject-matter" of the pending litigation. The most which the plaintiff can claim is, that by the transfer of the land *pendente lite*, the question of title may be open to contestation unless the doctrine of *lis pendens* applies. We are not bound to any authority on the question now considered, and we think it would be unwise to apply the doctrine of *lis pendens* in such a case as this. It would embarrass the transfer and alienation of land, without any compensating benefit, putting upon a purchaser the risk of ascertaining that no suit was pending for trespass upon lands purchased. An inspection of the pleadings in the former action, which resulted in favor of the plaintiff against Francis Ano, would have given the purchasers of lot 19 no notice that the controversy related to the line between lots 19 and 20. The complaint describes the entry as upon lot 20. The purchase was of eighty acres of lot 19, and the pleadings did not disclose that the controversy concerned any boundary between the lots. It was said in *Lewis v. Mew*, 1 Strob. Eq. 180, that for a *lis pendens* to affect a purchaser, there must be something in the pleadings at the date of the purchase to point his attention to the property purchased as the identical property or parcel of the identical property in litigation: See also Herman on Estoppel, sec. 189.

It is certainly reasonable in a case like this that where there is nothing in the pleadings to put a party on inquiry, the doctrine of *lis pendens* should not be applicable. The theory that parties are presumed to be cognizant of what is passing in the sovereign courts of justice, assumes that by consulting the records of the courts the fact may be ascertained; but we think the pendency of a trespass suit does not prevent a purchase of the land upon which the trespass was committed *pendente lite*, or give to a judgment for damages subsequently recovered therein the effect of an adjudication binding the title of such intermediate purchaser, even though he may have known that the action was for a trespass upon the lands purchased.

This leads to a reversal of the judgment and a new trial.

All concur.

LIS PENDENS — NOTICE — HOW FAR EXTENDS. — *Lis pendens* is notice of all facts apparent on the face of the plea, and of those other facts of which the facts so stated necessarily put the purchaser upon inquiry: *Powell v.*

Campbell, 20 Nev. 232; 19 Am. St. Rep. 350. A purchaser *pendente lite* of realty takes it subject to any title or interest adverse to his grantor that may be recognized finally in the pending litigation: *Cheever v. Minton*, 12 Col. 557; 13 Am. St. Rep. 258, and note. See extended notes to *Newman v. Chapman*, 14 Am. Dec. 774, and *McIlwraith v. Hollander*, 39 Am. Rep. 487.

JUDGMENTS IN ACTIONS OF TRESPASS QUARE CLAUSUM FREGIT—CONCLUSIVENESS OF. — A judgment in an action of trespass *quare clausum fregit* is conclusive upon the parties to a suit and their privies as to all matters put in issue in the suit: *Warwick v. Underwood*, 3 Head, 238; 75 Am. Dec. 767, and note; *Burt v. Sternburgh*, 4 Cow. 559; 15 Am. Dec. 402, and note.

PARKER v. MARCO.

[136 NEW YORK, 585.]

THE PRIVILEGE OF A SUITOR OR A WITNESS TO BE EXEMPT from the service of process while without the jurisdiction of his residence for the purpose of attending court in an action in which he is a party or a witness is a very ancient one, and extends to every proceeding of a judicial nature taking place in or emanating from a duly constituted tribunal which directly relates to the trial of the issue involved.

PRIVILEGE OF SUITOR FROM SERVICE OF PROCESS. — A non-resident of the state against whom an action is pending in a national court in the state of his residence and who comes to this state to attend the examination, before a notary public, of the plaintiff and the latter's witnesses, is exempt from the service of process, and if, while such defendant is here, the plaintiff dismisses the action in the other state and thereupon commences another for the same cause in the courts of this state and within its territory, serves process on the defendant while he is on his way home, such service is unauthorized, and should be vacated on motion.

A MOTION was made by the defendant to set aside the service of process upon him made under the circumstances designated in the opinion. The motion was granted by the special term, but on appeal to the general term the action of the special term was reversed, and from such reversal the defendant appealed.

John R. Abney, for the appellant.

T. Henry Dewey, for the respondent.

MAYNARD, J. The defendant is a resident of South Carolina and an action had been there brought against him in the federal circuit court by the plaintiff, who is a resident of this state. On April 6, 1892, the defendant came to the city of New York at the instance of the plaintiff to attend an examination of the plaintiff and his witnesses before a notary public, which by the agreement of the counsel for the respective parties had been set down for that date. The plaintiff procured

the defendant's assent to the examination upon the statement that he desired to be in readiness to try the cause at the ensuing April circuit, to be held at the city of Charleston. When the time for taking the testimony arrived the defendant was informed by plaintiff's counsel that he had abandoned his intention to take the evidence as proposed, for the reason that on account of sickness in his, the counsel's family, the plaintiff would not be prepared to go to trial at the April circuit, and he expected to be able to produce his witnesses in court when the trial should take place at a subsequent term. It was then late in the afternoon and the defendant returned to his hotel and remained over night, and the next morning started for his home in South Carolina. He was intercepted at the ferry by a process server, who served him with a summons in this action brought by the plaintiff in the supreme court of this state for the same cause of action at issue in the federal court in South Carolina. The defendant had no business in New York except that which related to the proposed examination. The defendant has appealed from an order of the general term, reversing an order of the special term, which set aside the service of the summons upon the ground that, when served, he was privileged from service.

Under section 863 of the Revised Statutes of the United States the plaintiff had an absolute right to take the testimony of his witnesses in this state to be used upon the trial of the action in South Carolina upon giving reasonable notice to the defendant. The compulsory character of the proceeding was not affected by the waiver of notice and the fixing of the time by the agreement of parties: *Plimpton v. Winslow*, 9 Fed. Rep. 365. The same section provides that a person may be required to appear and testify before the notary in the same manner as witnesses in open court, and section 915 of our own code authorizes any state judge to issue a subpoena to compel the attendance of a witness in such a case. In the trial of the action the notary thus becomes the arm of the court, and, as was held in *In re Rindskopf*, 24 Fed. Rep. 542, represents the court *pro hac vice*.

The privilege of a suitor or witness to be exempt from service of process while without the jurisdiction of his residence for the purpose of attending court in an action to which he is a party, or in which he is to be sworn as a witness is a very ancient one: Year Book 13, Hen. IV., I. B. Viner's Abr., "Privilege."

It has always been held to extend to every proceeding of a ju-

dicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice: *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568. At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts. We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common-law jurisdiction; but while the granting of the writ is proper, it is not necessary for the enjoyment of the privilege, and the only office which it can perform is to afford "convenient and authentic notice to those about to do what would be a violation of the privilege, and to set it forth and command due respect to it": *Bridges v. Sheldon*, 7 Fed. Rep. 44. The tendency has been not to restrict but to enlarge the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court and for a reasonable time in going and returning: *Larned v. Griffin*, 12 Fed. Rep. 592.

Hearings before arbitrators, legislative committees, registers, and commissioners in bankruptcy, and examiners and commissioners to take depositions, have all been declared to be embraced within the scope of its application: Bacon's Abr. "Privilege"; *Sanford v. Chase*, 3 Cow. 381; *Matthews v. Tufts*, 87 N. Y. 568; *Hollender v. Hall*, 13 N. Y. Supp. 758; 11 N. Y. Supp. 521; *Thorp v. Adams*, 11 N. Y. Supp. 479; *Bridges v. Sheldon*, 7 Fed. Rep. 44; *Plimpton v. Winslow*, 9 Fed. Rep. 365; *Larned v. Griffin*, 12 Fed. Rep. 592. It has even been extended to a suitor returning from an appointment with his solicitor for the purpose of inspecting a paper in his adversary's possession in preparation for an examination before a master: *Sidgier v. Birch*, 9 Ves. 69; and while attending at the registrar's office with his solicitor to settle the terms of a decree: *Newton v. Askew*, 6 Hare, 319; and while attending from another state to hear an argument in his own case in the court of appeals: *Pell v. Ball*, 1 Rich. Eq. 419. No good reason can be perceived why the privilege should not be extended to a party appearing upon the examination of his adversary's witnesses, where

the testimony is taken pursuant to the authority of law, and can be read upon the trial with the same force and effect as if it had been taken in open court. It is a proceeding in the cause, which materially affects his rights, and the necessity for his attendance is quite as urgent as it would be if the examination was had at the trial; but we do not think that the question of the necessity of his presence is material. It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action, which may be used for the purpose of affecting its final determination. It is essentially a part of the trial, and should be so regarded so far as it may be necessary for the protection of the suitor. There have been many analogous cases in the federal courts where the right to the privilege has been upheld. In *Bridges v. Sheldon*, 7 Fed. Rep. 44, the action was pending in the United States circuit for Vermont. A reference had been ordered to a master to take and state an account. The master on motion of the plaintiff had made an order for the taking of a deposition before a commissioner in the state of Iowa. The defendant, while attending before the commissioner in Iowa, was served with process in a suit brought by the plaintiff for the same cause of action as in the federal court. Judge Wheeler, in very strong terms, condemned the procedure and held that the defendant was absolutely privileged from service, and that the conduct of the plaintiff in causing such service to be made was a contempt of court, and could be punished as such. It seems that in such a case the party has a two-fold remedy. He may move in the court whose privilege has been violated to punish the party in that court who has been guilty of such violation, or he may move in the court out of which the process has been improperly issued to vacate it, and the motion will be granted.

In *Plimpton v. Winslow*, 9 Fed. Rep. 265, the suit was pending in the United States circuit for Massachusetts. By agreement of counsel testimony was taken before a special examiner in New York city, and while defendant was attending before the examiner he was sued by the plaintiff in the United States circuit for New York. Judge Blatchford set aside the service, saying: "It is very clear that the motion must be granted. The defendant attended as a party before the examiner. The regularity of the examination was recognized by the attendance of the plaintiff. The defendant had a right to attend upon it in person, whether he was to be himself examined as

a witness before Mr. Thompson or not, and he had a right to be protected, while attending upon it, from the service of the papers which were served in this suit. He attended in good faith. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the due administration of justice."

In *Larned v. Griffin*, 12 Fed. Rep. 592, the defendant was in Massachusetts attending upon the taking of a deposition under a commission issued out of the superior court of Cook County, Illinois, and was arrested upon civil process in an action brought in a state court of Massachusetts, which was afterwards removed into the United States circuit court. Judge Colt sustained a plea in abatement on the ground that the defendant was exempt from process. In *Hollender v. Hall*, 13 N. Y. Supp. 758; 11 N. Y. Supp. 521, the witness was attending, pursuant to a stipulation before a notary public, to have his deposition taken in an action pending in the United States district court for the southern district of New York, and the special term set aside the service of process upon him, and its decision was affirmed by the general term of the first department. A distinction is sought to be made between that case and the one at bar, because there the court in which the action was pending existed within the limits of this state, while here it is a court sitting in another state. There does not appear to be any sound principle upon which such a discrimination can rest. A federal court exercising its jurisdiction in another state has the same privileges and can afford to its suitors the same immunities as a like court sitting in this state. Both exist by virtue of the federal constitution and laws, which are supreme everywhere, and when taking testimony out of court in this state both are proceeding under the same act of the Congress. A party who is brought here in such a proceeding is, we think, entitled to the same protection without regard to the local jurisdiction of the court in which the action is pending.

It may be assumed that the plaintiff acted in entire good faith, and that his procedure was not a device to secure the presence of the defendant within the territorial jurisdiction of the courts of this state. In the view we take of the privilege of the defendant, the plaintiff's motive is of no importance.

The order of the general term should be reversed and the order of the special term affirmed, with costs.

All concur, except GRAY, J., dissenting.

PROCESS — EXEMPTION FROM, OF WITNESS OR SUITOR. — A resident of one state who comes into another, as a witness, is exempt from the service of process for the commencement of a civil action against him there, and he is protected while staying and returning provided he acts without unreasonable delay: *Boljiano v. Gilbert Lock Co.*, 73 Md. 132; 25 Am. St. Rep. 582, and note with cases collected; but in Rhode Island a non-resident suitor attending court in the prosecution of a suit is not exempt from the service of summons against him in another action: *Baldwin v. Emerson*, 16 R. I. 304; 27 Am. St. Rep. 741, and see also the note to this case. See extended note to *In re Healey*, 38 Am. Rep. 717-722.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

AYDLETT *v.* PENDLETON.

[111 NORTH CAROLINA, 28.]

PARTITION, WHEN FUTURE CONTINGENT INTERESTS ARE INVOLVED. — Partition will not be decreed when there are contingent remainders, or other future conditional interests, unless all of the parties who may by any possibility be interested, unite in asking for such relief.

PETITION for the sale of land for the purposes of partition. All the parties claim under a deed from Charles Guirkin, trustee, and A. L. Pendleton, to Jane R. Pendleton, George W. Pendleton, and Kate Pendleton. The petitioner, E. F. Aydlett, owns the life interest of said Jane R. Pendleton in the property as acquired by her under said deed. The defendants, George and Kate Pendleton, also own life interests with contingent remainders in the property under the conditions of said deed. They are unmarried infants without issue and oppose the sale. Judgment refusing to grant an order of sales in partition. Plaintiff appeals.

E. F. Aydlett, for the appellant.

E. C. Smith, for the respondent.

SHEPHERD, J. At common law there could be no compulsory partition between tenants in common, and it was within the power of each co-tenant to annoy and injure the others by an unreasonable assertion of his undoubted right to be in possession of every part of the lands of the co-tenancy. There being no right to the exclusive possession of any particular part, neither co-tenant had that incentive to improve or even to cultivate the land so held in common, as would invariably

attend a tenancy in severalty; and as the chief evils of the former species of tenancy grew out of the right of each tenant to the immediate possession of the whole, the statutes of 31 and 32 Henry VIII., compelling partition by writ, have been held in England and America to apply only to such tenants in common as have a present right of possession. "By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainderman": *Wood v. Sugg*, 91 N. C. 93, 49 Am. Rep. 639. This has always been the law in North Carolina until the act of 1887, c. 214, in which it is provided "that the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seised and possessed as if no life estate existed; but this shall not interfere with the possession of the life tenant during the existence of his estate." It is entirely clear that the statute does not apply to contingent remainders or other uncertain future interests, and as to these it is well settled that they cannot be sold for partition: *Simpson v. Wallace*, 83 N. C. 477; *Williams v. Hassell*, 74 N. C. 434; *Watson v. Watson*, 3 Jones Eq. 400; *Miller, ex parte*, 90 N. C. 625; *Irvin v. Clark*, 98 N. C. 445. Such being the law, we are unable to see how the court could have ordered a sale in the present case.

Conceding it to be true, as contended by the petitioner, that the issue of Kate and George can never take as such, and that their existence at the time of the death of said George and Kate is only a contingency, upon the happening of which the estates of the latter are to be enlarged into fees-simple, thus putting into operation the rule in Shelley's case, such estates are nevertheless subject to open and be defeated or modified by certain contingencies which can only be determined at the death of the said George and Kate. Thus, if both of these parties should die without leaving issue or the issue of such, then the whole estate, subject to these limitations (being two-thirds interest in the property) will go by way of remainder in fee to R. D. Williams. If, however, one of the said parties shall die leaving no such issue, then one moiety of his or her interest is to go to said R. D. Williams in fee, and the other to the survivor during his or her natural life, and then to his or her issue;

but failing in issue, or the issue of such, at the death of the survivor, then to said R. D. Williams in fee. Thus it will be seen that even according to this construction of the deed, there are future contingent interests, and though these may be represented by some person *in esse*, it cannot authorize the court in decreeing a sale for partition where there is objection by some of the parties interested.

It is true that in some instances a person may represent the interests of others of his class who are not *in esse*, but the court only decrees a sale in such cases where the interests of the parties will be materially and essentially promoted. Such is not the case before us. It is simply a petition for a sale for partition, and it is an inflexible rule of this court that no such sale will be decreed where there are contingent remainders, or other future conditional interests, unless all of the persons, who may by any possibility be interested, unite in asking for such relief.

Affirmed.

Partition of Contingent or Future Conditional Interests in Land.*

Reversions and Remainders. — It was the invariable rule of the common law that estates in remainder or reversion could not be divided by proceedings in compulsory partition. This rule still prevails in England: *Evans v. Bagshaw*, L. R. 8 Eq. 469, affirmed L. R. 5 App. C. 340, and generally throughout the United States, although there is some conflict of decision in the latter country because of various existing statutes. It is also well settled that in the absence of statutory provisions to the contrary, partition will not be awarded, either at law or in equity, of an estate held in remainder or reversion. *Wilkinson v. Stuart*, 74 Ala. 198, *Evans v. Bagshaw*, L. R. 8 Eq. 469. The reason for this rule is generally stated to be that tenants in reversion or remainder are not entitled to the possession, are in no respect inconvenienced or damaged by the undivided possession held by others, and consequently will not be permitted to interfere with tenants in possession, as they have no reason to interest themselves concerning the manner in which the estate of the tenant in possession is enjoyed. On the other hand the tenants in possession can compel partition only as to their particular estates and can do nothing toward effecting a severance of the estate in remainder or reversion: Freeman on Cotenancy and Partition, sec. 440.

Tenant in Possession whether Entitled to Maintain Partition as Against Remainderman or Reversioner. — Among the American cases which hold that a tenant for life, or a term of years, or under a lease in possession is not entitled to maintain compulsory partition against the reversioners, remaindermen or others having a future conditional interest in the estate may be cited: *Seiders v. Giles*, 141 Pa. St. 93; *Petition of Hodgkinson*, 12 Pick. 374; *Mutter of Miller*, 90 N. C. 625; *Parks v. Siler*, 76 N. C. 191; *Watson v. Watson*, 3 Jones Eq. 400; *Williams v. Hassell*, 73 N. C. 174; 74 N. C. 434; *Culver v. Culver*, 2 Root, 278; *Nichols v. Nichols*, 28 Vt. 228; 67 Am. Dec. 699; *Bald-*

* REFERENCE TO MONOGRAPHIC NOTE.

Partition, who may compel: 67 Am. Dec. 703-712.

win v. Aldrich, 34 Vt. 526; 80 Am. Dec. 695; *Zeigler v. Grim*, 6 Watts, 106; *Brown v. Brown*, 8 N. H. 94; *Norment v. Wilson*, 5 Humph. 310; *Robertson v. Robertson*, 2 Swan, 196; *Simmons v. MacAdams*, 6 Mo. App. 297. As illustrating this rule, it may be said that a tenant for life, entitled to and in the enjoyment of the sole and exclusive possession, cannot maintain an action for partition against remaindermen having a vested estate in fee subject to the life estate; *Seiders v. Giles*, 141 Pa. St. 93. A person seised in fee of an undivided interest in certain land and for life of the residue, is not entitled to partition as between himself and those having a contingent remainder in such residue; *Petition of Holykinson*, 12 Pick. 374. When a testator devises land to his daughter for life with remainder to such children as she may leave her surviving, the land cannot be sold for partition during the continuance of the life estate, for until the death of the life tenant those in remainder cannot be ascertained; *Matter of Miller*, 90 N. C. 625. Again when land is jointly held by two persons for their joint lives and the life of their survivor, a conveyance by one of them, during the life of the other, of an undivided share in the remainder will not merge his life estate, or give him such title as will enable him to maintain compulsory partition; *Johnson v. Johnson*, 7 Allen, 196; 83 Am. Dec. 676. When one person becomes the owner of one half of the reversion and one third of the leasehold, the remainder of the reversion being owned by another, who also owns one sixth of the leasehold, the remainder of the leasehold being owned by third parties, such first named tenant is not entitled to maintain partition; *Simmons v. MacAdams*, 6 Mo. App. 297.

In some jurisdictions, however, the rule prevails under special statutes, that a tenant in common of an undivided interest in an estate which is held subject to contingent or vested remainders or reversions may maintain a bill to compel partition and, when necessary, a sale of the premises, and when the remaindermen or reversioners are made parties defendant to the suit, the judgment rendered therein will be binding and conclusive as to their interests; *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646; *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455; *Brevoort v. Brevoort*, 70 N. Y. 136; *Sullivan v. Sullivan*, 66 N. Y. 37. In *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646, it was said "a reversioner is sometimes a necessary party to a bill in partition, but it is where the owner of a present interest in an undivided part of the premises has also an interest in the undivided part of the reversion. In such cases it is proper for such owner of the present interest to make the owner of the residue of the reversion, as well as those who are interested in the residue of the particular estate, parties to the suit, so that an entire share may be set off to the complainant in severalty. It is also necessary to make a reversioner a party to a bill filed by the owner of the particular estate, when some of the other parties interested in the residue of the premises are the owners of a present interest thereof in fee." Under the doctrine above announced, which is clearly contrary to the weight of authority, when all the parties in being having any estate or interest, present or future, vested or contingent, are made parties to an action for partition, a purchaser at a sale under a judgment therein, acquires a perfect title. The judgment is conclusive as to the rights of all, and the sale is effectual to bar the future contingent interests of persons not *in esse* at the time, although no notice is prohibited to bring in unknown parties, and although such future owners may take as purchasers, under a deed or will, and not as claimants under any of the parties to the action; *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455; *Chesnut v. Tabor*, 1 Fla. C. 629; *W.*

voort v. Brevoort, 70 N. Y. 136; *Freeman v. Freeman*, 9 Heisk. 301; *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; *Preston v. Brant*, 96 Mo. 552. "A judgment and sale in partition may conclude contingent interests of persons not in being, but this is only in cases where the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise": *Monarque v. Monarque*, 80 N. Y. 320-326; *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802. If the remainderman or reversioner in being is not made party defendant to the suit, his rights are not affected by any decree that may be rendered therein: *Gayle v. Johnston*, 80 Ala. 395; *Bell v. Adams*, 81 N. C. 119.

Remainderman or Reversioner, whether Entitled to Maintain Partition. — It is a rule of general application that to enable a party to maintain a bill for compulsory partition, he must have an estate in possession, one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co-tenants thereof. Tenants in remainder or reversion have no such estate. Hence it is generally held, both at law and in equity, that in the absence of any statute to the contrary, such tenants are not entitled to maintain a petition for compulsory partition: *Evans v. Bagshaw*, L. R. 8 Eq. 469; affirmed: L. R. 5 Ch. 340, *Wilkinson v. Stuart*, 74 Ala. 198; *Tabler v. Wiseman*, 2 Ohio St. 207; *Hughes v. Hughes*, 63 How. Pr. 408; *Hunnewell v. Taylor*, 6 Cush. 472; *Johnson v. Johnson*, 7 Allen, 196; 83 Am. Dec. 676; *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646; *Brownell v. Brownell*, 19 Wend. 367; *Sullivan v. Sullivan*, 66 N. Y. 37; *Brown v. Brown*, 8 N. H. 93; *Whitten v. Whitten*, 36 N. H. 326; *Zeigler v. Grim*, 6 Watts, 106; *Schori v. Stephens*, 62 Ind. 441; *Simpson v. Wallace*, 83 N. C. 477; *Wool v. Sugg*, 91 N. C. 93; 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. C. 203; *Alexander v. Alexander*, 26 Neb. 68; *Adair v. Hare*, 73 Tex. 273; *Savage v. Savage*, 19 Or. 112; 20 Am. St. Rep. 795. In the case last cited the court said: "Under this view there can be no seisin in law where there is not a present right of entry; and where the life tenant is in possession, and there being no present right of entry in the remainderman or reversioner, they are not constructively seised, and neither can maintain a suit as plaintiff in partition." In *Evans v. Bagshaw*, L. R. 5 Ch. 340, the court said: "The case, therefore, falls within the ordinary rule that the court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but it is founded on good sense in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of the whole, and several tenants in common in reversion, in which case the inconvenience would be obviously very great. At all events the rule is unquestionably settled." In *Hunnewell v. Taylor*, 6 Cush. 472, the court decided that a tenant in common of a reversion in land expectant on a lease for years could not maintain a petition for partition, and said, "that a petitioner for partition must have an estate in possession, or a present immediate right of entry and possession would seem necessarily to result from the nature and object of the petition. The petitioner seeks to have his share of the estate set off to him so that he may hold the same in severalty. The objects of partition are to avoid the inconveniences which result from a joint or common possession, and to enable the petitioner to possess, enjoy, and improve his share in severalty. If the petitioner has no estate *in presenti*, but *in futuro* only, if he has no present immediate right of entry and possession, then there are no inconveniences of a joint or common possession of which he can complain; nor can he possess and enjoy his share in severalty, which is the object he

seeks to accomplish by his petition. The objects of partition cannot be subserved by a division of an estate which may not come into possession for years after such division. In fact, the purposes of a person creating remainders may in many, perhaps in most, instances be defeated by a premature partition. In the present case, the petitioner having at the time of preferring his petition no present right of entry or possession, but only a reversion after the expiration of the leases for years, cannot maintain the petition. Whether the terms for years be short or long cannot affect the principle. The fact that the leases have now expired cannot affect the rights of the parties, which must be determined upon the facts as they stood when the process was instituted." The grantee of a deed in which the grantor reserves the right to remain in possession during his natural life, cannot maintain a suit for compulsory partition: *Nichols v. Nichols*, 28 Vt. 230; 67 Am. Dec. 699. In *Striker v. Mott*, 2 Paige, 387, 22 Am. Dec. 646, it was held that a party who had a future contingent interest in an undivided share of real estate could not sustain a suit for partition of the property, and the court said: "I am not aware of any case in which a party who has a mere reversionary interest in an estate has been permitted to apply for partition without the concurrence of the owners of the present interest. I can see no possible benefit which one tenant in common of a reversion, even if he has an absolute estate therein, can derive from a partition of his future interest in the property. He ought not, therefore, to be permitted to file a bill merely for the sake of making costs or to compel a sale of the property of his co-tenant. The sale, where it is permitted, is merely incidental to the partition, and is resorted to for the purpose of preventing a sacrifice of the property by a division. As the reversioner can derive no benefit from an actual partition of the premises during a continuance of the particular estate, he ought not to be permitted to commence a suit for the mere purpose of compelling a sale of the property during that period, or to subject other parties to costs prematurely and unnecessarily." In *Brown v. Brown*, 8 N. H. 93, it appeared that a widow had dower assigned her in part of the premises, and the remaindermen filed a bill for partition. The court said: "No case is to be found that gives the slightest countenance to the supposition that, where several are interested together in a remainder after a freehold estate, any of them can maintain a petition for partition of the land in which they are so interested." In *Sullivan v. Sullivan*, 66 N. Y. 37, the court said: "There are obvious reasons why a remainderman should not, especially as against tenants in possession, whether of a term of years, for life, or in fee, be entitled to institute the proceeding. Any partition which might be made at his instance, although equal when made, might be very unequal when his estate should vest in possession. So, too, if actual partition could not be made, and a sale should be necessary, the tenants having a less estate than a fee might be deprived of the substantial benefit of their terms. We think it too well settled by authority, as well as upon principle, that a remainderman cannot, as against others not seised of a like estate in common with him, maintain the action to disturb the rule. If the action should be extended, and the benefit given to other parties, it must be done by legislation." Under the peculiar statutes of a few of the states which do not require a tenant or party to be in possession, or entitled thereto, to enable him to maintain a suit in partition, it has been determined that remaindermen and reversioners in fee of an undivided interest in land may maintain partition against the owner or owners of the remaining undivided interest in remainder or reversion, although the whole premises are subject to a life

estate or a lease for a term of years unexpired: *Scoville v. Hilliard*, 48 Ill. 453; *Cook v. Webb*, 19 Minn. 129 (167); *Smalley v. Isaacson*, 40 Minn. 451; *Smith v. Gaines*, 38 N. J. Eq. 65. A dictum in *Blakeley v. Calder*, 15 N. Y. 617, to this effect was long supposed to be the law of New York, and this case has been cited generally and numerous as sustaining this doctrine. In the late case of *Sullivan v. Sullivan*, 66 N. Y. 37, however, the rule announced in *Blakeley v. Calder*, 15 N. Y. 617, was expressly repudiated and overthrown, the court deciding that the right to maintain partition is given only to one having actual or constructive possession of the land sought to be partitioned; and as a remainderman or reversioner has neither, but simply an estate to vest in possession *in futuro*, he cannot institute or maintain an action in partition. *Sullivan v. Sullivan*, 66 N. Y. 37, is discussed at considerable length in *Savage v. Savage*, 19 Or. 112; 20 Am. St. Rep. 795. It would seem that if one of several remaindermen files a bill during the lifetime of the tenant for life, making the latter a party defendant, and asking for a partition of the land, and such life tenant files an answer consenting to partition and waiving his right to the possession of the land, a partition may be decreed among the remaindermen: *Bice v. Nixon*, 34 W. Va. 107.

GRIST v. WILLIAMS.

[111 NORTH CAROLINA, 53.]

SALES AND REALES — RESCISSION OF CONTRACT — AGENCY. — When a buyer refuses to receive and pay for goods delivered to him under a contract of sale, the seller has a right either to rescind the contract or resell the goods and recover the difference in price from the buyer. Such resale is not, *per se*, evidence of a rescission of the contract, as the seller, in making the resale, is regarded as the agent of the buyer.

STATUTE OF LIMITATIONS — NON-RESIDENCE. — Although a non-resident debtor has property within the state, the operation of the statute of limitations is suspended while he is absent from the state.

ACTION to recover the difference between the contract price for the sale of potatoes and the amount received upon a resale. The plaintiff, a resident of North Carolina, entered into a contract with defendant, a resident of Virginia, by which the former agreed to deliver to the latter a certain quantity of potatoes at a certain price. Plaintiff delivered the goods, but defendant refused to receive them, and under instructions from plaintiff disposed of them, remitting the proceeds to him.

Judgment for plaintiff, and defendant appeals.

C. F. Warren, for the plaintiff.

J. H. Small, for the defendant.

SHEPHERD, J. According to the findings of the jury the plaintiff complied in every respect with the terms of the contract of sale, and the potatoes were duly shipped to the de-

defendant. Upon their arrival in the city of Norfolk, Virginia, the point of destination, the defendant wrongfully refused to receive them, telegraphing to the plaintiff, "We cannot receive them; wire us when and where to ship for your account. Answer by wire immediately." It is well settled that under such circumstances the vendor had a right either to rescind the contract or resell the potatoes and hold the vendee responsible for the difference in price. It is also well established that such a resale by the vendor "is not *per se* evidence of a rescinding of the contract": *Hurlburt v. Simpson*, 3 Ired. 233. When the vendor makes such a resale he is considered as acting as the agent of the vendee: 1 Benjamin on Sales, 1077, note; and as he has a right to act as such agent for that purpose, we are unable to see why in this case, considering the perishable nature of the article, the necessity for immediate action and the intervening distance, the vendor could not direct the vendee to make the sale without necessarily rescinding the contract. In the absence of any further testimony as to what actually transpired between the parties we cannot, merely upon this correspondence, reverse the finding of the jury that the contract was not rescinded.

The exception addressed to the ruling of the court excluding the testimony as to the indebtedness of several other parties in Washington, N. C., to the defendant, cannot be sustained. The testimony could not have affected the suspension of the statute of limitations under the code, sec. 162, as the fact of the possession of property in the state by a non-resident does not put the statute in force so as to bar his personal liability. The real facts respecting the alleged rescission, being evidenced by the correspondence, and not being disputed, the testimony offered was not relevant for any other purpose than to show that the statute was suspended by reason of the non-residence of the defendant. If admitted for any other purpose, without objection, the defendant had no legal right to introduce evidence in its rebuttal.

In looking over the record we can find no error, and the judgment must therefore be affirmed.

SALES — SELLER'S RIGHT TO SELL AGAIN AND CLAIM DEFICIENCY. — If a vendee of goods refuses to accept them, the vendor may resell and hold the vendee liable for the difference between the sum realized and that which was to have been paid by the vendee: *Van Horn v. Rucker*, 33 Mo. 391; 84 Am. Dec. 52; *McComb v. McKenna*, 2 Watts & S. 216; 37 Am. Dec. 505, and note; *Sawyer v. Dean*, 114 N. Y. 469; *Atwood v. Lucas*, 53 Me. 508; 89

Am. Dec. 713, and note; *West v. Cunningham*, 9 Port. 104; 33 Am. Dec. 300, and note; *Rosenbaum v. Weeden*, 18 Gratt. 785; 98 Am. Dec. 737; *Unexcelled Fireworks Co. v. Polites*, 130 Pa. St. 536; 17 Am. St. Rep. 788, and note.

LIMITATIONS OF ACTIONS — ABSENCE FROM STATE. — Absence of a party from the state stops the running of the statute of limitations as to actions against him: *Stone v. Hammell*, 83 Cal. 547; 17 Am. St. Rep. 272; *Hoffman v. Pope*, 74 Mich. 235; *Stanley v. Stanley*, 47 Ohio St. 225; 21 Am. St. Rep. 806, and note with cases collected. See note to *McCann v. Randall*, 9 Am. St. Rep. 675; extended note to *Moore v. Armstrong*, 36 Am. Dec. 72. As to what constitutes absence from the state and its effect upon the statute of limitations, see extended note to *Langdon v. Dowd*, 83 Am. Dec. 644.

ESTIS v. JACKSON.

[111 NORTH CAROLINA, 145.]

ESTOPPEL IN PAIS — CREATION OF. — To create an estoppel *in pais* there must be some conduct of the party against whom the estoppel is alleged amounting to a representation or concealment of material facts, and when everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises.

ESTOPPEL — WHEN NOT CREATED. — When the owner in fee of land labors under a misapprehension that he has only a life estate therein, with remainder to his children, and signifies his consent to their conveyance of their supposed interest by merely signing their deeds thereof, which do not otherwise mention him, without receiving any consideration, and after the deed vesting absolute title in him has been read in the presence of the children's grantee, such original owner or his grantee, in the absence of any misrepresentation or concealment as to the facts constituting title, are not estopped from asserting title to the land.

ACTION to recover damages for waste. Sally Loyd, being the owner in fee of certain land, but supposing that she only had a life estate therein, with remainder to her children, signified her assent to their conveyance of their supposed interest by signing deeds made by them to the plaintiff. Her name did not otherwise appear in such deeds nor did she receive any consideration for signing them. She subsequently conveyed her interest in the land to the defendant. Defendant obtained judgment and plaintiff appealed.

J. W. Graham, A. W. Graham, and J. T. Strayhorn, for the appellants.

J. H. Fleming, for the respondent.

SHEPHERD, J. Without discussing the general doctrine, it is sufficient to say in the present case that, in order to work an estoppel *in pais*, "there must be conduct — acts, language

or silence — amounting to a representation or a concealment of material facts,” and that “the truth concerning these facts must be unknown to the party claiming the benefit of the estoppel”: 2 Pomeroy’s Eq. Jur., 264. “The estoppel is removed by proof that the party claiming its existence, even though mistaken in regard to his rights at law, had notice of the actual state of the facts at the time of acting upon the representation, and this, though the representation was made under oath”: Bigelow on Estoppel, 520. “The estoppel does not apply where everything is equally well known to both parties”: Herman on Estoppel, sec. 957; Bispham’s Equity, 288; Dutchess Kingston’s Case, notes Smith’s L. C.; *Holmes v. Crowell*, 73 N. C. 613; *Loftin v. Crossland*, 94 N. C. 76; *Exum v. Cogdell*, 74 N. C. 139; *Mayo v. Leggett*, 96 N. C. 237. In *Exum v. Cogdell*, 74 N. C. 139, the court uses the following language: “In this case it appears, either by admission or the findings of the jury, that the plaintiff knew all the material facts in regard to the title, and could not have been deceived by misrepresentations of the defendant.”

Applying the foregoing principles to the facts before us, it is plain that there is no estoppel. Mrs. Loyd was the owner in fee of the land in controversy, the same having been conveyed to her by one N. E. Cannady. She, her children, and the purchaser were all alike ignorant of the legal effect of the conveyance which was read to the parties at the time of the present transaction. It was supposed by them that Mrs. Loyd had but a life estate, and that the children were entitled to a remainder in fee. The plaintiff purchased what she understood was the interest of the children, and the consideration was paid to them alone. Mrs. Loyd appears to have had nothing to do with the transaction but to signify her assent to the sale, which, in view of the understanding of the persons interested, was entirely unnecessary. She made no representation as to the rights of the children, except to state in effect that she was willing that they should sell their supposed interest reserving to herself a life estate. This, as we have seen, was done in view of a misapprehension of her title, which misapprehension was common to all of the parties, and it cannot reasonably be inferred that anything she said or did had the slightest effect in misleading the plaintiff. There was no withholding of information on her part, but, on the contrary, every fact which she knew concerning her title was equally well known to the purchaser. She was no party to the deeds

executed by her children, and her signature to the same was of no effect: *King v. Rhew*, 108 N. C. 696; 23 Am. St. Rep. 76. Having received no consideration, and being guilty of no misrepresentation or concealment as to the real facts constituting her title, there is nothing in the nature of fraud, either actual or constructive, which can estop her grantee from asserting her interest in the premises.

The affidavits filed before his honor in reference to his alleged misunderstanding of the testimony cannot be considered by us. The granting of a new trial upon such a ground is a matter of discretion, and not the subject of review in this court: *Munden v. Casey*, 93 N. C. 97; *McCulloch v. Doak*, 68 N. C. 267.

Affirmed.

ESTOPPEL IN PAIS — WHEN ARISES. — If a person by his conduct or acts of encouragement induces another to change his position, so that the latter will be prejudiced pecuniarily by the assertion of an adverse claim by the former, the former will be estopped to assert such a claim: *Scott v. Jackson*, 89 Cal. 258; *Nell v. Dayton*, 43 Minn. 242; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285; *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23, and note; *Bynum v. Preston*, 69 Tex. 257; 5 Am. St. Rep. 49, and note; *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307, and note; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366. See note to *Marines v. Goblet*, 17 Am. St. Rep. 24; note to *Graham v. Thompson*, 29 Am. St. Rep. 42; extended note to *Guffey v. O'Reiley*, 57 Am. Rep. 432; note to *Brown v. Bowen*, 86 Am. Dec. 414. But however well calculated the conduct of one may be to influence the conduct of another, no estoppel can arise unless he who alleges it was thereby induced to act and did act: *Tower v. Haslam*, 84 Me. 86; *Koenigheim v. Sherwood*, 79 Tex. 508; *Irvin v. Ellis*, 76 Tex. 164; *Madden v. Louisville etc. R'y Co.*, 66 Miss. 258.

BLACKWELL v. LYNCHBURG AND DURHAM R. R. Co.

[111 NORTH CAROLINA, 151.]

PRACTICE — SUBMISSION OF ISSUES — DISCRETION OF COURT. — When any specific view of the law, arising out of the testimony, may be presented to the jury through the medium of pertinent instructions upon the issues submitted, the court may properly refuse to submit additional issues.

EMINENT DOMAIN — DAMAGES BY BLASTING. — The prudent use of blasting to remove hard material in constructing a railway is always deemed to have been in contemplation when the damage was assessed for the right as a necessary incident to the privilege; but when damage done to the owner of land adjacent to that within the condemned boundary results from managing or handling explosive material carelessly or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable therefor in a new action.

DAMAGES FROM BLASTING — DUTY TO GIVE NOTICE OF DANGER. — When contractors engaged in blasting upon a railroad right of way, by habitually giving warning of approaching danger from a blast induce an adjacent land owner to act upon the idea that the usual signal will be given at the accustomed time, the failure to give such signal will subject the contractors to liability in damages for an injury inflicted on such owner, who puts himself in danger by being misled by such failure.

DAMAGES FROM BLASTING ON RAILROAD RIGHT OF WAY. — The privilege of throwing stones or other material two hundred yards and beyond the right of way by means of blasting in constructing a railway, so as to endanger the lives of owners of adjacent lands and of members of their families when engaged in their domestic duties on their premises, does not pass with the right of way as a necessary incident, and if such persons are thus injured through the negligence of the parties engaged in the construction work the latter are liable in damages.

DAMAGES FROM BLASTING — DUTY TO PROTECT ADJACENT OWNERS. — When a contractor engaged in the construction of a railway knows, or by the exercise of reasonable diligence could know, that stones thrown out by his blasting had been falling on or around the premises of an owner adjacent to the right of way so as to imperil the safety of the latter or his family, while engaged in ordinary domestic duties, it is the duty of the contractor to cover his blasts, or if this is impracticable, to give actual warning to those placed in peril by the explosion. A failure to perform this duty renders him liable for injury inflicted thereby, unless the negligent conduct of the injured party was the proximate cause of the accident.

BLASTING — DUTY TO PROTECT PERSONS PLACED IN DANGER. — Persons using a powerful explosive in blasting are charged with knowledge of any fact in reference to its actual effect, that they could by reasonable diligence have ascertained. They are also charged with the duty to adopt some means to protect persons placed in danger by the explosion of such blasts, and a failure to perform this duty is negligence for which they are liable in damages.

NEGLIGENCE IN BLASTING — DUTY OF PERSON IN PERIL. — When a person is placed in peril through the negligence of another in exploding a blast, he need only make an effort to protect himself, and if he makes a mistake and errs in judgment in seeking safety, he cannot be said to be guilty of negligence.

ACTION to recover damages for the death of a person by blasting in the construction of the defendant's railway. Moorman & Co., the defendant's contractors, while engaged in constructing the said roadbed exploded a blast, about two hundred yards from the residence of the deceased adjacent to the right of way, which threw a stone and killed him while engaged in domestic duties on his premises. Judgment against Moorman & Co. only, and they appeal. Other facts are stated in the opinion.

J. W. Graham, W. A. Guthrie, and V. S. Bryant for the appellants.

J. Parker, for the respondent.

AVERY, J. The defendant does not contend that any specific view of the law, arising out of the testimony, could not be presented to the jury through the medium of pertinent instructions upon the issue submitted. This being the test of the question whether the judge below kept within the bounds of his discretionary power when he refused to add the issue suggested, the first exception is manifestly not well founded: *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 151; *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727; *Meredith v. Cranberry Coal and Iron Co.*, 99 N. C. 576; *Boyer v. Teague*, 106 N. C. 633; 19 Am. St. Rep. 547. This court has, moreover, repeatedly held that in cases like that at bar it is not an error to submit a single issue involving the question whether the injury was caused by the defendant's negligence with an inquiry as to damages, though it has been suggested that by modifying that and adding one, and in some cases two others, a jury might be made to comprehend their duty more clearly: *Scott v. Wilmington etc. R. R. Co.*, 96 N. C. 428; *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 151; *Denmark v. Atlantic etc. R. R. Co.*, 107 N. C. 185; *Braswell v. Johnston*, 103 N. C. 150; *Bottoms v. Seaboard etc. R. R. Co.*, 109 N. C. 72.

Excavating by blasting is one of the approved methods of constructing a railway, and the prudent use of such an agency in removing hard material is always deemed to have been in contemplation when the damage was assessed for the right-of-way, as a necessary incident to the privilege; but where damage is done to the land of the owner adjacent to that within the condemned boundary, if it result from managing or handling explosive material carelessly, or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable in a new action: 1 Wood's Railway Law, 634, and note; *Sabin v. Vermont etc. R. R. Co.*, 25 Vt. 363; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 253; *Bellinger v. New York etc. R. R. Co.*, 23 N. Y. 47; *Losee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *G. B. & L. Ry Co. v. Eagles*, 9 Col. 544; *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423; *Dodge v. Commissioners*, 3 Met. 380; 2 Shearman and Redfield on Negligence, sec. 717. Where there is testimony tending to show that injuries done to the adjacent land, or the buildings on it, were due to the use of unsafe or unnecessarily violent explosive material, or were caused by the careless

management of the materials in common use, and also contradictory evidence, it is for the jury to find the facts upon which the question of negligence depends. Where a human being is killed or injured at his dwelling on his own land by a blast on the right of way, condemned out of the same tract, in addition to passing upon the questions whether proper material was used and handled with skill, the testimony may make it material for the jury to determine whether the agents of the corporation had been accustomed to give the injured party a signal before igniting the powder, and, if so, whether such notice was given before the explosion which caused the injury: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 473; 26 Am. St. Rep. 581; 2 Wood's Railway Law, 1313, and note 3; *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 363; 87 Am. Dec. 644; *Newson v. New York etc. R. R. Co.*, 29 N. Y. 383; *Spencer v. Illinois etc. R. R. Co.*, 29 Iowa, 55; *Langan v. Railroad*, 3 Am. and Eng. Railroad Cases, 355. Where a corporation, by habitually giving some warning of approaching danger, whether from passing trains or expected explosions, induces the public to act upon the idea that the usual signal will be given at the accustomed time, the failure to meet this just and natural expectation, which has arisen from observation of the custom of the company's agents, will subject the corporation to liability for an injury inflicted on one who puts himself in danger because he is misled by such omission: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 473; 26 Am. St. Rep. 581; 2 Wood's Railway Law, 1313, and note 3. Indeed, the decision of the court of appeals of New York imposed upon the corporation, in cases like that at bar, the duty of either adopting some means for preventing projectiles from being thrown so as to subject a person to danger in his own house or yard, or of giving him personal and timely notice so that he may escape: *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258. The application of the principle that we have stated to the facts of this case, will enable us without difficulty to dispose of most of the exceptions relied on and set out in the formal assignment of error.

We do not think that the privilege of throwing stones through the air two hundred or more yards and beyond the right of way, so as to endanger the lives of the owners of adjacent land and of the members of their families, when engaged in their domestic duties in and around their dwelling-house, passes with the right of way as a necessary incident to the

easement. "In determining what is the duty, the failure in which constitutes negligence, regard is to be had to the growth of science and the improvements in the arts which take place from generation to generation, and many acts or omissions are now evidence of carelessness which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill which in a few years will be considered the height of imprudence": 1 Shearman and Redfield on Negligence, sec. 12. The supreme court of Michigan held, where one was passing along a public road and was injured by a blast in a mine on land adjacent to the road, it was negligence in the owner not to cover the mine so as to protect travelers from missiles thrown up by the explosive material: *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163; 45 Am. Rep. 30. The defendants introduced as a witness an acknowledged expert (one Gleves), who was a civil engineer. He testified that on ordinary railroad work in the country, and remote from dwellings, it was not customary to cover blasts, but when blasting was done near a city or a dwelling-house, that a covering could be made of green hides or timber so as to break the force of the projectiles or prevent their going so far as to subject persons passing along the streets or in their own yards or houses to danger. There was evidence tending to show that stones had been thrown into the intestate's yard by previous blasts at the same place, and that the plaintiff, his wife, having received warning, had been compelled to gather her children to the house to get them out of danger. If the defendant or his employees did not know that the missiles had been thrown to such a distance, they ought, in the exercise of ordinary care, to have known it if they were subjecting the intestate and his family to danger, and to have taken proper precaution to guard against it. Indeed, their own testimony tended to show such knowledge, since some of defendant's witnesses testified to having given, or heard warning given by others, to intestate's family by calling out "Fire." At any rate, persons using such an inflammable and powerful instrumentality are charged with knowledge of any fact in reference to its actual effect that they could by reasonable diligence have ascertained. Knowing, then, that previous blasts had endangered the persons of intestate, his wife and children, if the explosion occurred in a shaft or in a deep cut so situated that covering could be easily constructed out of timbers or hides so as to protect intestate against the danger, it was the

duty of the defendant to have provided such structure. If it was not practicable at any cost reasonably commensurate with the nature of the work to prevent the projectiles from being thrown into intestate's yard, then it was incumbent on defendant to see that intestate and his family had actual and timely notice of impending danger before igniting the fuse. The supreme court of Massachusetts held that where a contractor (like Moorman & Co. in this case) caused stones to be thrown, by blasting, upon a building in process of construction, he was liable to respond in damages not only for the injury done to the building by the falling stones, but for loss of time of the workman in putting it up, when, in consequence of actual notice, they went into a place of safety till the danger was over: *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423.

We concur with the judge below in the opinion that if the defendant contractor, or his agent in charge of the work, knew, or could by reasonable diligence have known, that the stones thrown out by his blasts had been falling on or around the dwelling of intestate so as to imperil the safety of the family engaged in their ordinary household work, it was his duty to have protected them by constructing a covering, if his work was in such a depression that he could erect barriers at reasonable cost, and thereby obviate the danger; but if the costs of such coverings would have been so great as to consume all or more than all of the profit he would otherwise have derived from performing his work under the contract, we think that in any event he could not escape the duty devolving upon him so soon as he had knowledge, or ought to have known, of the danger, of giving actual warning to those who were in peril. When it was shown that the family of the intestate were exposed to such danger from the blast, and that defendants, in the exercise of reasonable diligence, ought to have known that fact, it was incumbent on them, if they would relieve themselves from responsibility, to show that they had provided the covering or given the warning, or that the negligent conduct of plaintiff's intestate was the proximate cause of the injury.

As the judge below left the liability of the defendant dependent upon actual knowledge of the danger, before the duty of constructing a covering or giving warning would arise, the defendant has no reason to complain of the legal propositions laid down by him. Nor can he assign as error the fact that the

judge embodied in his charge, as an abstract proposition, what is known as the "rule of the prudent man," in response to and in compliance with a request contained in both clauses, three and nine, of his prayer for instructions, especially when, in specific instructions given afterwards, he correctly applied the law of negligence and contributory negligence to the facts of this case as a guide to the jury in their deliberations. If the plaintiff's intestate had remained in his yard, or at his well when he was engaged in his ordinary work, instead of going behind the corner of the house, the negligence of the defendant, which, under instruction of the court, was to be considered as a cause of injury only on condition of his failure to erect a covering, if practicable, or at all events to give warning of the danger, would have been the proximate cause of the injury. The jury were instructed in effect that they should respond "No" to the issue involving defendant's negligence, unless they found he had failed in his duty as to erecting a covering or giving warning, and if they so responded to that issue, it would be unnecessary to consider the other issues, so that they could not reach the second issue till they had found that "plaintiff's intestate was killed by the wrongful act or negligence of Moorman & Co., evinced in the omission, when it was practicable to do so, at reasonable cost, to erect a covering or to give timely notice." There was conflicting evidence as to the giving of actual warning as the intestate's wife testified that "nobody hallooed at all," while two of the defendant's witnesses testified as to notice. Contradictory statements, if made by her, went to the jury as bearing upon her credibility, of which they were the sole judges. After finding that the defendant was in fault in not giving timely notice or failing to construct a covering, the intestate would not be culpable if he remained in the open yard without warning. So we fail to see how, after passing upon the first issue, it was material to consider whether the intestate took refuge behind the house or not; but the jury evidently reached the conclusion that he did, and that it was a safe place. We do not think that intestate was bound to find an absolutely safe place. He, at most, was expected in the hurry of the moment and when in peril, brought about by defendant's negligence, to have made an effort to protect himself, and like a passenger who errs in judgment in seeking safety in case of derailment of a train, he was not culpable if he made a mistake; 2 Wood's Railway Law, 1141, 1146. notes. If the judge left questions to the jury that were not properly

within their province, the defendant can assign it as error only on condition that he shows that he was thereby injured, and that he cannot do in this case.

The rule for determining the amount of damages in which he mentions the net earnings, with health, habits, etc., as factors in making the estimate, was not erroneous, as far as it went, and there was no such failure to comply with the requests as to furnish ground for complaint.

It was not error to give a summary of the contentions on both sides, nor was it error to mention the fact of killing as the point of departure in enumerating plaintiff's contention, and in giving a summary of the testimony relied on by him: *State v. Boyle*, 104 N. C. 800.

Upon a view of all the exceptions relied on, we think that there was no error of which the defendant could justly complain.

No error.

NEGLIGENCE. — INJURY CAUSED BY BLASTING: See *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936, and note with the cases discussing the subject collected; *St. Peter v. Denison*, 53 N. Y. 416; 17 Am. Rep. 253, and extended note in which the duty to give notice of a blast is discussed. See also extended note to *Hay v. Colocs Co.*, 51 Am. Dec. 283.

BROWN v. POSTAL TELEGRAPH COMPANY.

[111 NORTH CAROLINA, 187.]

TELEGRAPH COMPANIES — VOID REGULATION AS TO REPEATING MESSAGES.

A stipulation contained in a form used by a telegraph company in its business operations to the effect that it will not be responsible in damages for mistakes or delays in transmitting unrepeatd messages, is void as against public policy, and the further stipulation that the company will be liable only in a limited amount for such mistakes or delays in respect to repeated messages, is void for the same reason.

TELEGRAPH COMPANIES — DAMAGES FOR NEGLIGENCE IN FAILING TO TRANSMIT OR DELIVER PROPERLY. — When a contract to transmit and deliver a telegraphic message exists, a failure to perform the undertaking

is either excusable or negligent, without regard to any degree of negligence, and if negligent, the party injured is entitled to damages, not according to the degree of negligence, but in proportion to his injury, unless it is a case in which punitive damages may be allowed.

TELEGRAPH COMPANIES — POWER TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE. — The rule that no one can provide by contract against liability for negligence in any degree, applies as well to telegraph companies as to other corporations and persons.

J. W. and A. W. Graham, for the appellants.

John Devereux, Jr., for the respondent.

MACRAE, J. The plaintiffs were damaged by the negligence of defendant's agent in substituting the words "forty-seven" in the message as delivered for "twenty-seven" in the message sent, by reason whereof the plaintiffs' tobacco was sold for a price less than it would otherwise have brought on the market. The message was written on the blank furnished by the Western Union Telegraph Company, with the well known stipulation upon it that the company would not be liable for damages caused by mistakes or delays, unless repeated. This message was delivered to and sent by the agent of the defendant, the Postal Telegraph Company; but we prefer to treat the question presented as if there were but a single and controlling point involved, and to this we address ourselves.

It was not ordered by the sender to be repeated, and was therefore what is known as an unrepeatable message. Upon the admissions in the pleadings, and the verdict in response to the issues fixing the value of the tobacco at the time of the sale, the plaintiffs moved for judgment in their favor for the difference between the sum actually received by them and the value of the tobacco. His honor, in accordance with the decision in *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334, denied the plaintiffs' demand, and signed judgment in favor of the plaintiffs for the sum paid by the sender to the defendant for the transmission of the message. The plaintiffs appealed, and this brings up again the question whether the stipulation upon the back of the blank, and made part of the contract, as before referred to, is valid and binding upon the parties.

It was held by a divided court in *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334, that a stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for mistakes in transmitting unrepeatable messages, is a reasonable one, and will be enforced by the courts. *Lassiter's* was the first case which came before this court involving a construction of the said stipulation and its effects upon the rights and liabilities of the parties thereto. This court, recognizing the persuasive authority of the courts of last resort in other states, adopted the views expressed in a majority of the cases which had

been decided, although even then there were very respectable authorities to the contrary. Since this decision was made, there has been much discussion, and many and conflicting adjudications upon the same question have been made in other courts; and we are induced to review the opinion heretofore announced by this court.

It was early held that telegraph companies were not common carriers, and therefore not insurers, but that there was an analogy between the duties and responsibilities of these transmitters, for reward, of messages, and those of carriers of goods for hire, and that the former were, like the latter, held to a high degree of diligence in the conduct of their business: Thompson on Electricity, sec. 137, and note.

When the art of telegraphy was yet in its infancy, when its operators were untrained, its appliances crude, and its efforts tentative, it would have been unreasonable to require that skill which would be demanded in a more advanced stage when, with practiced operators and perfected machines, the system had become an indispensable part of the business of the world.

The condition printed as a part of the contract upon the back of the blank upon which messages were written, that to ward against mistakes and delays the sender of a message should order it repeated at an additional charge of one half the regular rates, was considered not so much a stipulation against negligence, as a reasonable precaution in order to procure accuracy in the transmission of messages by means of the electric current. It was then that by the fancied analogy between this system and the business of the common carrier the courts came to use the terms which had been used with regard to the latter, and to hold that the telegraph companies might, on account of the novelty of their operation, provide against negligence on the part of their employees, or by reason of imperfections in their instruments, by means of which negligence or imperfections mistakes and delays were permitted to occur in the transmission of messages. The then recognized distinction between what was called gross and ordinary or slight negligence was invoked, and it was held that while for ordinary or slight negligence they would not be responsible, yet they would be held to account for gross or willful negligence.

But negligence is the failure to exercise that care which, under the circumstances of the case, a prudent man ought to

use. There can be no degrees in negligence in this matter. In ascertaining what damages may be awarded against one for injury by reason of negligence, the question whether it was gross or ordinary may determine as to punitive or compensatory damages; or where the doctrine of comparative negligence is recognized, it may be necessary to distinguish between degrees; but where there is a contract to transmit a message for reward, a failure to perform the undertaking is either excusable or negligent; if negligent, the party injured thereby is entitled to his damages, not according to the degree of negligence at all, but in proportion to his injury, unless it be a case in which punitive damage is allowed. If, on account of an electrical disturbance in the atmosphere, a message could not be sent, so that there was delay, or it could not be but imperfectly sent, so that words were dropped, or if from any other cause, not to be provided against with the appliances afforded by science and by a reasonable foresight, there was a failure to comply with the contract, these were matters provided for by law, and not necessary to be stipulated against in the contract.

The old principle that one cannot provide by contract against liability for negligence, applies to every species and degree of negligence or tort: Cooley on Torts, 687. In *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334, this exemption from liability "is not extended to acts of omission involving gross negligence, but is confined to such as are incident to the service, and which may occur when there is but slight culpability in its officers and employees."

In *Pegram v. Western Union Tel. Co.*, 97 N. C. 57, it is said that the stipulation on the back of the blanks restraining liability for unrepeatd messages where the complaint is not a mistake in the message, but for delay or failure in delivery, is unreasonable and void. In *Cannon v. Western Union Tel. Co.*, 100 N. C. 300, 6 Am. St. Rep. 590, the doctrine in *Lassiter's* case is affirmed, but the language of the opinion in *Western Union Tel. Co. v. Hall*, 124 U. S. 444, is quoted with approval: "Of course where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in market value, are clearly within the rule for estimating damages."

In *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, reasserting that this stipulation, as far as delay is concerned, is void, a doubt is intimated as to its validity at all, and it is plainly said though not necessary to be declared in the decision upon the point involved in that case, "The more recent cases, founded upon the more thorough investigation and thought given to the subject, are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void." We refer to the cases from other states cited in the opinion just referred to: *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 15 Am. St. Rep. 917; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353.

We have come to the conclusion, after a natural hesitation, to overrule a decision of a majority of this court announced by the former very learned chief justice, that the true principle is that telegraph companies are corporations erected for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and in cases where celerity and dispatch are necessary, taking the place of the postal service, that at least ordinary skill and diligence are required of them, and that public policy forbids they should be protected from liability for damage by reason of any degree of negligence: Gray on Communications by Telegraph, sec. 46, and cases there cited; Thompson on Electricity, secs. 235, 236, and note.

As the art of telegraphy has now attained such high efficiency there is less reason why any rule of safeguard to the public interest should be relaxed.

The principles of the law are always the same, but they extend their grasp and take in the necessity for those new things which the advance in science and art provide for the public safety and convenience, and require them to be used. The increasing number of higher courts, both state and federal, with their ever accumulating decisions, render it impracticable that we should cite many of the authorities bearing upon the subject we have under consideration. Most of them are referred to in Gray's Communication by Telegraph, c. 5; Thompson on Electricity, cc. 6 and 8; 2 Harris on Damages by Corporations, sec. 869 et seq.

There is an additional proviso in the printed endorsement upon the telegraphic message blank to that which we have

just considered: "Nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured." The reasons which have brought us to the conclusion that the condition we have already considered is void will apply with equal force to the one now presented. "The precept of public policy which, on the ground of the inequality of the parties, the compulsion of the employer and the duties of a telegraph company towards the public, dictates the invalidity of a stipulation limiting the liability of a telegraph company to nothing beyond the price paid for transmission, must equally deny validity to a stipulation limiting the liability of a telegraph company to fifty times that price": Gray on Communication by Telegraph, sec. 51.

There is error. Upon the admissions and the verdict judgment should be rendered in favor of the plaintiffs and against the defendant for the sum claimed in the judgment presented by them as set out in the record.

Judgment reversed.

TELEGRAPH COMPANIES — REGULATIONS AS TO REPEATING MESSAGES. — A stipulation in the printed blanks used by a telegraph company exempting it from liability for its negligence in the transmission of unrepeatd messages beyond the price of sending the same is unreasonable and void as against public policy: *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 15 Am. St. Rep. 917, and note; note to *Pepper v. Telegraph Co.*, 10 Am. St. Rep. 711; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353, and note. The contrary doctrine seems to prevail in the following cases: *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687; *To'in v. Western Union Tel. Co.*, 146 Pa. St. 375; 28 Am. St. Rep. 802. If the importance of a message does not appear on its face, in the absence of gross and inexcusable neglect on the part of the company, it will not be liable for an error in transmission where the message is unrepeatd: *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590.

TELEGRAPH COMPANIES — POWER TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE. — A telegraph company cannot by any contract not fair, just, and reasonable, if at all, limit its liability for damages caused by its negligence in the transmission of messages: *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and particularly note in which the cases are collected; note to *Western Union Tel. Co. v. Munford*, 10 Am. St. Rep. 634; *Hickness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672, and note; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126, and note. See also *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 21 Am. St. Rep. 662, and note.

MARTIN v. GOODE.

[111 NORTH CAROLINA, 288.]

JURISDICTION — TEST OF. — The aggregate sum demanded in good faith is the test of jurisdiction, though made up of several causes of action.

JURISDICTION — WHEN NOT OUSTED. — When the sum demanded in good faith is reduced under the jurisdictional limit by failure of proof or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction is not thereby ousted unless there is a misjoinder of parties. If there is simply a misjoinder of causes of action the court should order the action divided, and not dismissed.

PLEADING AND PRACTICE — DISCRETION OF COURT. — The court has a right, *ex mero motu*, to direct that the pleadings shall be made more explicit, as that all of a will instead of one clause thereof shall be stated.

WILLS — CONSTRUCTION OF CLAUSE IN. — A clause in a will stating that "my mother is to have \$150 out of my estate annually as long as she lives, and that she remain with my wife during the remainder of her life," imposes no charge upon the testator's estate for the board of his mother.

ACTION against Mary F. Goode, administratrix, to recover an annuity of \$150 charged against her testator's estate, and also to recover the further sum of \$359.46, the value of board which she refused to furnish and for which it was alleged she was liable under the following clause of her testator's will set out in the complaint: "My mother, Letitia Edwards, is to have \$150 out of my estate annually as long as she lives, and that she remain with my wife, Mary F. Parker, during the remainder of her life." Judgment for the defendant, and the plaintiff appealed.

W. W. Peebles and Son, for the appellant.

R. B. Peebles, for the respondent.

CLARK, J. It is the sum demanded in good faith which is the test of jurisdiction: Const., Art. IV., sec. 27; The Code, sec. 834. Though there may be several causes of action, each of which is for less than two hundred dollars, if the aggregate demand is for more than two hundred dollars, the superior court has jurisdiction whenever the causes of action are such as can be joined in the same action: *State v. Roberts*, 108 N. C. 174; *Moore v. Nowell*, 94 N. C. 265; *Estee's Code Pleading*, sec. 1609.

Should the sum demanded be reduced under two hundred dollars by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted: *Usry v. Suit*, 91 N. C. 406, 414; *Brickell v. Bell*, 84 N. C. 82, except when the sum demanded is so palpably in bad faith as to amount to a fraud

on the jurisdiction: *Wiseman v. Witherow*, 90 N. C. 140; or where there is a misjoinder of parties: *Mitchell v. Mitchell*, 96 N. C. 14. If there is simply a misjoinder of causes of action, the judge should order the action divided, not dismissed: The Code, sec. 272; *Street v. Tuck*, 84 N. C. 605; *Finch v. Baskerville*, 85 N. C. 205; *Hodges v. Wilmington etc. R. R. Co.*, 105 N. C. 170.

In the present case there are two causes of action alleged against the defendant as administratrix *c. t. a.*, one of \$359.46, and another of \$150, both bearing interest from dates set out. Both are alleged specifically in the complaint as liabilities to be satisfied "out of the estate" of the testator. There was on the face of the complaint no misjoinder of parties, and there was error in dismissing the action.

If the court below was correct in holding that the first cause of action was not a valid charge against the estate, and should more properly have been sued for against the defendant personally, still that would not make it a case of misjoinder. There would be simply a failure as to a part of plaintiff's demand.

It may be there was defective pleading in attempting to obtain the construction of a will with so small a part thereof set out. In such cases much often depends upon the context, and all the will, or at least all material parts, should be appended to the complaint as an exhibit, unless set out in the body of the complaint. It is probably a case where the court below *ex mero motu* should have directed the pleadings to be made more explicit under the Code, sec. 261: *Turner v. Cuthrell*, 94 N. C. 239; *McKinnon v. McIntosh*, 98 N. C. 89; *Buie v. Brown*, 104 N. C. 335.

As it may avoid the necessity of another appeal, we will say, however, that if the only clause of the will bearing upon the subject is section 4, which is set out in the complaint, we concur with his honor below that there was no charge imposed by the will upon the testator's estate for the board of his mother. Whether the wife, by taking benefit under the will, has taken it *cum onere*, so as to be chargeable individually with the mother's board, is a question not material in this action.

The judgment of dismissal must be set aside, and the case remanded to the superior court, that the complaint may be reformed in accordance with this opinion.

Reversed.

JURISDICTION, AMOUNT. — The actual amount in controversy determines the jurisdiction over the cause: *Keadle v. Siddons*, 131 Ind. 597; *Jewell v. Town of Sullivan*, 130 Ind. 574. An action may be maintained in the circuit or county court on several notes, the aggregate amount of which exceeds the sum necessary to give such courts jurisdiction, although the amount of each note is insufficient to confer jurisdiction: *Nashville Bank v. Henderson*, 5 Yerg. 104; 26 Am. Dec. 257; see extended note to *Fix v. Sissung*, 21 Am. St. Rep. 617.

JURISDICTION NOT OUSTED, WHEN. — A case should not be dismissed for want of jurisdiction where an action in *assumpsit* on the common counts is in good faith brought in the county court, the plaintiff believing that he had a valid claim for two hundred dollars, but an error in one of his bills is discovered which reduces his claim below that amount: *Scott v. Moore*, 41 Vt. 205; 98 Am. Dec. 581, and note.

TINSLEY v. HOSKINS.

[111 NORTH CAROLINA, 340.]

NEGOTIABLE INSTRUMENTS — COSTS OF COLLECTION. — A stipulation in a note that in case it is collected by "legal process, the usual collection fee shall be due and payable therewith," is contrary to public policy, and void.

L. M. Scott, for the appellant.

J. A. Barringer, for the respondent..

SHEPHERD, C. J. The defendant executed to the plaintiff a promissory note for the sum of \$146.35, payable on the 1st of July, 1889, "with legal interest from maturity," and it was stipulated therein "that in case this note is collected by legal process, the usual collection fee shall be due and payable therewith."

The sole question presented for review is whether such a stipulation is valid and enforceable. The point has never been passed upon by this court, and there is some conflict of judicial decisions upon the subject in other states. We think, however, that the ruling of his honor is sustained by the better reasoning, as well as by a decided preponderance of authority. In *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662, it is declared that "such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy, and void." To the same effect are the cases of *Myer v. Hart*, 40 Mich. 517; 29 Am. Rep. 553; *Toole v. Stephen*, 4 Leigh, 581; *Boozer v. Anderson*, 42 Ark. 167; *Shelton v. Gill*, 11 Ohio,

417; *Martin v. Trustees etc.*, 13 Ohio, 250; *Dow v. Updike*, 11 Neb. 95.

In *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356, Justice Cooley uses the following very forcible language: "A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeiture may be imposed to an amount without limit. The provision in those notes is as much void as if it would have been, had it called the sum unpaid by its true name of forfeiture or penalty."

In *Witherspoon v. Musselman*, 14 Bush. 214; 29 Am. Rep. 404, the agreement was to pay a reasonable attorney's fee in the event of the note being "collected by suit." The court placed its refusal to enforce such contracts upon the ground that "they are not only in the nature of penalties, but that they are contrary to public policy and tend to encourage litigation."

A discriminating writer in the *American Law Review* (No. 14, page 858) remarks: "It seems to us to be more consistent with public policy to consider such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be under the guise of an attorney's fee."

Mr. Daniel, in his work on *Negotiable Instruments* (vol. 1, sec. 62a), expresses the opinion that, "unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments, and they are, therefore, against the policy of the law, and void."

In consideration of the foregoing authorities, and in view of the serious evils that may result from such an innovation, we are of the opinion that stipulations like the one now sued upon, when incorporated into obligations of this particular character, are against public policy and therefore invalid.

Judgment affirmed.

MACRAE, J., dissents.

NEGOTIABLE INSTRUMENTS—STIPULATIONS IN AS TO FEES FOR COLLECTION.
A stipulation in a bill of exchange that the parties will pay all attorney's fees in case of a suit on the paper, entitles the holder to recover for such fees in an action to enforce the payment of the bill: *Bank v. Fuqua*, 11 Mont.

285; 28 Am. St. Rep. 461, and note; but in *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94, it was held that such a stipulation would render a negotiable note payable to order non-negotiable; and see note to this case in which the authorities are collected. See also extended note to *Witherspoon v. Musselman*, 29 Am. Rep. 406.

FRENCH v. MUTUAL RESERVE FUND LIFE ASS'N.

[111 NORTH CAROLINA, 391.]

LIFE INSURANCE — CONSTRUCTION OF CONDITION IN POLICY. — When one who has his life insured allows his policy to lapse and the insurance company reinstates him by accepting payment of back dues upon condition that he is of "temperate habits, in good health then and for twelve months past, and free from all disease, infirmity, or weakness"; a slight and temporary illness within the year previous to his reinstatement, which does not render him uninsurable and from which he has entirely recovered at the time of his reinstatement, does not violate such condition nor vitiate his insurance.

ACTION on a policy of life insurance. Duval French insured his life in favor of the plaintiff. He allowed his policy to lapse for non-payment of dues, but was reinstated by the defendant association upon the payment of back dues, and upon condition: "1. That said member is now living and of temperate habits, and is now, and has been during the past twelve months in continuous good health and free from all disease, infirmity or weakness; otherwise said payment and this receipt and said policy shall be null and void, and the sum paid hereon shall be subject to the order of the within named person. 2. The receipt and the acceptance of the within sum by the association shall not be held to waive forfeiture or expiration of membership, or to reinstate membership, or to create any liability on the part of the association under said policy, except upon fulfillment of the first condition of this receipt." While the policy was lapsed and before the receipt for reinstatement was given the assured had been slightly unwell but had entirely recovered. He died about six months after such receipt was given. The defendant association maintained that such illness was in violation of the condition in the receipt and vitiated the policy.

Judgment for the plaintiff and defendant appealed.

John W. Hinsdale, for the appellant.

Thomas W. Strange, for the respondent.

CLARK, J. We think the instruction of his honor was correct. The reasonable construction to be put upon the agreement of the parties, as expressed in the conditions printed upon the reinstatement receipt, was not that any illness, however slight or insignificant, within the preceding twelve months, should vitiate the reinstatement. It could mean no more than that if there had been such illness or impairment of health that the assured would not have been received if he had been an original applicant for insurance, the reinstatement was void. The company could not have intended to put itself in a better condition, or the defendant in a worse one, than that. Had the policy been maintained in force, impairment of health would not give the company a right to cancel it; as it had lapsed, the company in effect says to the assured that it will reinstate him upon payment of unpaid dues, provided he is in unimpaired health and would be insurable as a new risk. The language of the condition is, if the assured is of temperate habits, and is now and "has been during the past twelve months in continuous good health and free from all disease, infirmity, or weakness." The issue presents the question, if there had been a compliance with that condition. The court below told the jury that if the assured, during the twelve months prior to the reinstatement, had suffered no illness "except of a temporary nature and not severe in its character, which did not render him uninsurable, which indicated no vice in his constitution, and from which he had entirely recovered at the time of making the payment," this was a compliance with the condition of the receipt. The jury found the fact so to be. Upon such finding the plaintiff should be entitled to recover the amount due by the terms of the policy of insurance. The simple question is as to the construction to be placed upon the condition. No aid can be drawn from decisions in cases more or less similar in other states. Certainly a slight illness did not come within the terms quoted. The line must be drawn somewhere. We think that indicated in the charge a just one.

No error.

MACRAE, J., dissents.

INSURANCE — LIFE — BREACH OF WARRANTY OF GOOD HEALTH — WHAT DOES NOT AMOUNT TO. — The term "sound health," when used in questions in applications for life insurance, means a state of health free from any disease or ailment that affects the general soundness of the system seriously, and not a temporary indisposition which does not tend to weaken or under-

mine the constitution of the assured: *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894; *Bancroft v. Home Ben. Ass'n*, 120 N. Y. 14; extended note to *Mtine Ben. Ass'n v. Parks*, 10 Am. St. Rep. 242, defining good health; extended note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 634, discussing the invalidity of life insurance policies owing to the existence of disease affecting the applicant.

ATLANTIC EXPRESS COMPANY v. WILMINGTON AND WELDON RAILROAD COMPANY.

[111 NORTH CAROLINA, 463.]

CARRIERS — REGULATION OF FREIGHTS AND FARES — CONSTITUTIONAL LAW.

The legislature has authority to delegate power to a commission to provide reasonable rules and regulations in respect to fixing reasonable freight and passenger tariffs by railroads and other common carriers, to prevent unjust discriminations and preferences, and to regulate other matters pertaining to transportation within the state, subject to the right of appeal to the courts.

CONSTITUTIONAL LAW — RAILROAD COMMISSION — JUDICIAL POWERS OF. — A statute creating a railroad commission, with power to prescribe rules for the regulation of freights and fares within the state, may confer judicial powers upon it and define its jurisdiction so long as such jurisdiction is inferior to that of the supreme court; nor is the statute void for failing to provide in detail methods of procedure. Such details may be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with law, as are necessary to the exercise of the powers conferred.

CONSTITUTIONAL LAW — RAILROAD COMMISSION — ENFORCEMENT OF PENALTY FOR VIOLATION OF RULES. — A statute giving power to a railroad commission to prescribe rules and regulations as to freights and fares, and providing that upon the failure of any railroad company to make full recompense for a violation thereof, the commission may proceed in the courts after notice to enforce the penalties prescribed for a violation of such rules, is valid, although it fails to provide in detail the method of procedure.

RAILROADS — DISCRIMINATION BETWEEN EXPRESS COMPANIES. — A railroad company cannot be compelled to furnish express facilities to a special express company to conduct an express business over its road the same as it provides for itself or affords to some special express company, when it affords express facilities for all matter offered, has not held itself out as a common carrier of express companies, and is not compelled by special statute. In such case its refusal to carry a special express company over its road is not a violation of a railroad commission's rule that "no railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper to be transported by the train for which it is offered."

O. H. Guion and W. W. Clark, for the plaintiff.

A. W. Haywood and F. H. Busbee, for the respondent.

SHEPHERD, C. J. Although we are of the opinion, for the reasons hereinafter stated, that the particular relief asked for in this proceeding is not authorized by the provisions of what is known as the "railroad commission act," still we do not feel at liberty to ignore the important question of jurisdiction suggested in the answers of the defendants and the arguments of counsel. The question is a serious one, and involves in a great measure the efficiency of the legislation designed for the "supervision" of railroad companies and other common carriers in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations and preferences, and the regulation of other matters pertaining to transportation within the state in which the public is deeply interested. That the legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes, is too well settled to admit of discussion: *Durham etc. R. R. Co. v. Richmond etc. R. R. Co.*, 104 N. C. 673; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Railroad Co. v. Richmond*, 19 Wall. 584; and it is equally well settled that in delegating such authority to a commission it does not transcend its constitutional powers: *Stone v. Farmer's etc. Trust Co.*, 116 U. S. 307; 19 Am. & Eng. Ency. of Laws, 686, and the numerous authorities cited in the notes. "The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great, and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not: *Georgia R. R. etc. Co. v. Smith*, 70 Ga. 694.

A careful scrutiny of the act of assembly constituting a "railroad commission" (Acts 1891, c. 320) fails to disclose a purpose to confer upon that body anything in the nature of legislative power. The act, among other things, denounces excessive charges, unjust discriminations, and preferences as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing" the same, the reasonableness and legality of such rules and regulations being reviewable by the courts. This power, as we have just seen, may be delegated to a commission, and any objection on that ground is therefore untenable.

It is insisted, however, that the commission has no jurisdic-

tion to entertain and pass upon complaints made in respect to the violation of the provisions of section 4, and perhaps other sections of said act. That section declares that all unjust discriminations and preferences shall be unlawful, and it is urged that the only remedy provided against its infraction is by indictment, to be prosecuted in a court of competent jurisdiction. It is very plain to us that the contention is without foundation, as in section 5 the authority of the commission to make rules and regulations for the prevention of these very acts is expressly conferred. The subjects embraced in section 4 are perhaps the most important that are confided to the regulation of the commission, and without reference to the plain language of the act, it is hardly to be supposed that the legislature intended to insert therein a merely penal provision entirely independent of and unconnected with the duties imposed upon that body.

Neither is there any force in the argument that the legislature cannot confer judicial powers upon the commission, as the constitution (article 4, section 2) expressly authorizes the establishment of such courts inferior to the supreme court as the legislature may deem proper; and it is to be observed that the commission has been "created and constituted a court of record," with all the "powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating" the same: Acts 1891, c. 498.

Whether a court, having no power to enforce its judgments, fulfills the definition of a court of record and of general jurisdiction, is unnecessary to be considered. It is sufficient to say that the legislature has the authority to establish courts inferior to the supreme court, and to "allot and distribute" its jurisdiction "as it may deem proper": Const., art. 4, sec. 12. The question, then, is simply whether the power to hear and determine complaints of this character has been conferred, and this is easily solved by a perusal of section 10 of the said act, which is as follows: "That if any railroad company doing business in this state by its agent or employees shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, . . . ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall

incur a penalty for each offense of not less than fifty dollars nor more than five thousand dollars, to be fixed by the judge of the court in which such action shall be tried. An action for the recovery of such penalties shall lie in any county of the state where such violation has occurred or wrong has been perpetrated, and shall be in the name of the state of North Carolina. The commissioners shall institute such action through the attorney-general or solicitor of the judicial district in which the violation has occurred," etc.

It must be noted that the present proceeding is not an action instituted by the commissioners for the enforcement of penalties; nor is it, as suggested, an ordinary civil action for the recovery of damages as is provided in section 11 of the act. It is brought for the purpose of seeking "ample and full recompense" for the alleged "wrong and injury" done the complainant. The act looks beyond the mere infliction of a penalty for the violation of a rule or regulation, and evidently provides for specific redress in the premises. This redress is to be "directed by said commissioners" upon due notice to the party complained of, and it is difficult to understand how the proper measure of relief can be ascertained except by examination of testimony. The necessary conclusion, therefore, must be that the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred.

No summons was issued in the present proceeding, as in civil actions, but upon a complaint being filed the defendants were notified to "satisfy the complaint or answer the same," within thirty days. After hearing the testimony, the commission declared, in effect, that the rule and regulation made pursuant to the law had been violated, and that "ample and full recompense" should be made by providing the complainant with the facilities mentioned in the order. It is insisted that, as no procedure is provided, the commission has no authority to make an order of this character. It is true that no particular rules of practice are prescribed, but the power to rehear and determine upon notice is, as we have seen, expressly given, and all necessary means are provided for the conducting of any inquiry which it is the duty of the commission to make. Provision is made for the service of notices, the attendance of witnesses, and the punishment of contempts, and the rules of evidence are declared to be the same as in civil actions. It is also provided that there may be an appeal

"as in other cases of appeal" from "all decisions or determinations arising under the operation or enforcement" of the act. We cannot hold that, with all of these facilities provided by law, a power expressly granted to hear and determine is to be denied because the particular form of the complaint, or the manner in which the proceeding is to be entitled, or some other immaterial matter of detail, is not particularly prescribed. Besides, such details may well be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon them: 4 Am. & Eng. Ency. of Law, 450, and cases cited.

It must be admitted, however, that in many respects the act is singularly obscure and confused. It bears the impress of hasty legislation, and seems to be composed of parts of other acts of a similar character, united with but little regard to order or perspicuity. Its amendment, in many particulars, may well be considered by the law-makers. Among its defects we find the strange omission of any provision in section 10 as to the effect to be given to the determination of the commissioners, in an action brought in the superior court for the enforcement of the penalties prescribed. Whether, in the absence of an appeal, such a determination is conclusive, or whether it simply amounts to a *prima facie* case, are questions left in very great doubt. This, however, cannot affect the right to hear and determine what recompense shall be made to an injured party. The power is expressly conferred, and it is the duty of the commission in all proper cases to exercise it. The effect of such a determination, when brought before the courts, is quite another thing. We are, therefore, of the opinion that the commission has ample authority to entertain and pass upon complaints for a violation of any rule or regulation respecting the matters embraced within section 4 of the said act.

2. Having disposed of the question of jurisdiction, we will now inquire whether the present complainant is entitled to the particular relief which it seeks in this proceeding. It must be borne in mind in considering this case that there is no complaint that the public — that is, the demands of persons who desire to ship express freight — are not fully met and supplied. The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express

matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves, or afford to any other express company. That this is a proper statement of the question is apparent from the application of the complainant and the findings of the commission. It distinctly appears that the complainant made no actual tender of any article of freight to be transported by the defendants, but that it demanded "rates and facilities for conducting an express business over their roads in this state," and that each of the defendants "should furnish it with a car or carriage over its respective lines, and rates of transportation as well within as without the limits of the state for the shipment of goods within the scope of its organization." It is not insisted that the defendants have ever held themselves out as common carriers of express companies; "that is to say, as common carriers of common carriers" (Express Cases, 117 U. S. 1); and the chief point to be determined is whether, in the absence of such a usage, the law imposes a duty of that character upon them. It is contended that such a duty is imposed by the following provision of section 4 of the act constituting the commission: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

We are of the opinion that the foregoing provision does not change or enlarge the common-law duty which the defendants owe the complainant. That constitutional provisions in almost the same language have been construed but as declaratory of the common law is shown by various authorities.

The constitution of Colorado declares "that all individuals, associations, etc., shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges

or facilities for transportation of freight or passengers within the state."

The constitution of Kansas provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, and no railroad company shall make any discrimination or preference in furnishing cars or motive power."

The constitution of Arkansas provides "that all individuals and corporations shall have equal rights to have persons and property transported over railroads, . . . and no undue or unreasonable discrimination shall be made in charges or facilities in transportation."

The constitution of Missouri provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company . . . shall make any preference in furnishing cars or motive power."

In speaking of these constitutional provisions, Waite, C. J., says: "These provisions impose no greater obligations than the common law would have imposed without them": *Atchison etc. R. R. Co. v. Denver etc. R. R. Co.*, 110 U. S. 667. This high authority settles the question that our railroad commission act does not extend the common-law duty; and it therefore becomes material to inquire whether, at common law, the defendants owed the complainant the duty sought to be imposed in this proceeding.

The supreme court of the United States, in the express company cases (*Express Cases*, 117 U. S. 1), has answered the question. It declares that "in the absence of some special statute, there is no law which requires railroads to furnish express facilities to all express companies which may demand them." It must be noted that these cases came from the states of Colorado, Kansas, Arkansas, and Missouri; and it is in the light of the constitutional provisions above quoted that this and the following language of the chief justice is used: "The railroad companies perform their whole duty to the public at large, and to each individual when it affords the public all reasonable express accomodation. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public requires the carriage, but the company may choose its own appropriate means of carriage, always provided they are such

as to insure reasonable promptness and security. . . . "The constitution and laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which, in positive terms, requires a railroad company to carry all the express companies in the way that, under some circumstances, they may be able, without inconvenience, to carry one company. . . . In some of the states statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, as in Maine and New Hampshire, but these are of comparative recent origin, and thus far seem not to have been generally followed."

In view of the foregoing authorities, we are of the opinion that so much of the order of the commission as determines that "the refusal of the defendants to grant to the plaintiff facilities for conducting an express business was a violation of the terms of said act," is not warranted by the statute under consideration.

The judgment of the commission, however, also declares that the defendants have violated rule 8 of the "regulations concerning freight rates." The rule is as follows:—

"No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper for transportation by the train for which it is offered."

We are unable to see, that in view of the facts found, there has been any violation of this rule. No duty is imposed by the rule upon any railroad company, but it merely prohibits the refusal to perform a duty by reason of any contract with an express or other company. We have seen that the defendants did not owe any duty to act as a "common carrier of express companies." Had they owed such a duty we are very sure that they could not have avoided its performance because of their having made an exclusive contract with the Southern Express Company. We do not think, however, that the rule applies to this case. The defendants have not refused to act as a common carrier, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying on an express business upon their roads, and this we have seen they had a right to do. In this refusal they were not guilty of making any discrimination or preference within the act of the legislature. As we have seen, the

supreme court of the United State has said that they are under no obligation to carry another company, and the mere fact that they are carrying another company does not amount to an unjust or unreasonable preference. It is the duty of the defendants to carry express matter, but they may carry it themselves or employ competent agencies for that purpose: Express Co. Cases, 117 U. S. 1-34; 29 Am. and Eng. R. R. Cases, 545, and the authorities cited in the notes. The supreme court of the United States, in deciding the cases just referred to, stated that "railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness, dispatch, and comfort to the passengers. The express business on passenger trains is, in a degree, subordinate to the passenger business, and it is, consequently, the duty of a railroad company, in arranging for the express, to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the condition on which it will be occupied. The space that can be given to the express business on a passenger train is to a certain extent limited. . . . If the general public were complaining that the railroad companies refused to carry express matter themselves on their passenger trains, or allow it to be carried by others, different questions would be presented." The same remark is applicable if the agencies adopted by the railroads (in this case the Southern Express Company) are not affording the public sufficient facilities. It is further to be observed that the power to fix rates and tariffs for such agencies is conferred upon the commission by section 13 of the act. We will also observe that if the defendants had held themselves out as common carriers of express companies, they would have been guilty, in this case, of discrimination, or the giving of a preference, and, therefore, subject to the regulation of the commission, had that body declared such discrimination or preference under the circumstances to have been "unjust" or "unreasonable."

In view of the facts found by the commission, and of the high authority we have cited, we are of the opinion that the defendants have violated no duty imposed by the law. If other duties are to be imposed, it must be by further legisla-

tion, and not by the courts. "To what extent it must come, if it comes at all from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract, or by statute, the court cannot be called upon to give it effect": Waite, C. J., 117, U. S. 1-34.

The judgment below is affirmed.

RAILROAD COMMISSION — POWER OF LEGISLATURE TO CREATE. — Where a statute delegates power to a railroad commission to fix just and reasonable rates for freight and passenger tariff to be observed by railroad companies, such statute is not void as being a delegation of legislative power: *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417; 12 Am. St. Rep. 220; *Storrs v. Pensacola etc. R. R. Co.*, 29 Fla. 617; see also *Woodruff v. New York etc. R. R. Co.*, 59 Conn. 63.

EXPRESS COMPANIES — DISCRIMINATION BETWEEN BY RAILROADS. — This question is discussed in the note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 653, 654.

MASON v. RICHMOND AND DANVILLE R. R. Co.

[111 NORTH CAROLINA, 482.]

MASTER AND SERVANT — DEFECTIVE MACHINERY — BURDEN OF PROOF. —

In an action by a servant against his master to recover for injuries received in the use of defective machinery, the burden of proof is upon the servant to show that the machinery was defective, that such defects were the proximate cause of his injury, and that the master had knowledge, or might by the exercise of ordinary care have had knowledge of such defects.

MASTER AND SERVANT — DUTY AS TO MACHINERY FURNISHED. — Although a railway company need not furnish machinery of the very best kind, or attach appliances of the latest and safest kind for the use of its servants, still it is negligent if it uses cars or engines of any particular pattern which an ordinary inspection would show to be defective.

RAILROADS — DEFECTIVE CARS — LIABILITY OF COMPANY. — When freight-cars are obviously so defectively made, whether by a failure to attach bumpers at all or to make them sufficiently long to protect a person standing between the cars while in motion or in consequence of any other fault in construction, that the slightest indiscretion on the part of a servant may endanger his life, the company is liable for any injury resulting from such defects.

RAILROADS — DEFECTIVE CARS — LIABILITY FOR INJURY TO BRAKEMAN. — When a railroad brakeman, acting under the order of the conductor on a train but contrary to the rules of the company to which he has assented,

is injured in coupling defective cars of which defect the company has, or ought to have, knowledge, and of which the brakeman has no notice until too late to avoid the injury, the company is liable therefor.

RAILROADS — LIABILITY FOR DEFECTIVE CARS. — When the rolling stock or machinery of a railroad company is so defective in its construction that by an ordinary inspection the company could discover its condition, the company is liable for an injury received by its servant in consequence of such defects, unless, notwithstanding such want of care on the part of the company, the supervening negligence of the servant was the proximate cause of the injury complained of.

RAILROADS — DEFECTIVE CARS — LIABILITY FOR INJURY TO BRAKEMAN. — A railroad brakeman, in coupling cars on a dark night, has a right to assume that they are in good and safe condition, and is not negligent in running between them without stopping to examine whether they are supplied with proper bumpers or not.

RAILROADS — NEGLIGENCE — PROXIMATE CAUSE. — Notwithstanding any real or supposed negligence of an injured servant, a railway company is liable in damages if but for its own want of care the injury could have been avoided.

RAILROADS — NEGLIGENCE IN FAILING TO PROVIDE BUMPERS FOR CARS. — When a failure on the part of a railway company to place any bumpers at all on its cars is the proximate cause of a collision in which a brakeman is injured, this is proof of gross negligence on the part of the company.

MASTER AND SERVANT — FELLOW-SERVANTS — WHO ARE NOT. — A conductor in charge of a railroad train and a brakeman thereon engaged in coupling cars are not fellow-servants.

RAILROADS — WAIVER OF RULES. — A rule of a railway company assented to by a brakeman in its employ is waived by the company when its conductor in charge of the train orders such brakeman to act contrary to such rule, and it is his duty to obey such order.

ACTION to recover damages for personal injuries received by plaintiff when in the employ of the defendant company. On the night of December 14, 1889, while it was yet quite dark, plaintiff was ordered by the conductor on his train to couple some box-cars then standing on a side track. Finding it impossible to couple the cars with a stick, he went between them and undertook to couple them with his hands. Before he could get out from between the cars, which were not furnished with bumpers, he was crushed between them, receiving permanent physical injury. These cars were furnished with old-style couplings, while many of the cars of the defendant were furnished with the Janney coupler, acknowledged to be the most modern, improved, and safe coupler in use, and by which cars can be coupled from the outside without going between them. The plaintiff, while in the employ of the defendant, had signed a rule of the company mentioned in the opinion as "Exhibit A," and which reads as follows: "I will

understand that the rules of the Richmond and Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above and fully understand it." After plaintiff signed this contract or rule, he informed the conductor on his train that it was impossible at all times to couple cars with a stick without going between them, and the conductor ordered him to make couplings with his hands whenever he could not make them with the stick. This order had been obeyed by the plaintiff on a number of occasions with the knowledge of the conductor and engineer on his train. Upon proof of these facts the plaintiff suffered a nonsuit, and appealed.

J. A. Barringer, for the appellant.

D. Schenck, for the respondent.

EVERY, J. The court below held that, upon the whole evidence, the plaintiff had failed to make out a *prima facie* case. The burden was upon the servant suing his employers to show: 1. That the machinery was defective; 2. That the defects were the proximate cause of the injury; 3. That the master had knowledge, or might by the exercise of ordinary care have had knowledge of such defects: *Hudson v. Charleston etc. R. R. Co.*, 104 N. C. 491. The question presented by the appeal, therefore, is whether in any aspect of the evidence the plaintiff has relieved himself of the *onus probandi* imposed upon him by law.

The first point to be considered is, whether the defendant company was negligent in failing to provide what is known as the Janney, or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another. The general rule is, that it is not the duty of railway companies to furnish machinery of the very best varieties, or to attach appliances of the latest and safest kinds, but that it is culpable to use cars or engines of any particular pattern which, an ordinary inspection, would show to be defective. In view of

the changes incident to new inventions and discoveries, facts which would not have shown negligence a few years since may now, or in the near future, be declared in law ample evidence of culpable dereliction in duty, such as involves liability for damages: 1 Shearman and Redfield on Negligence, sec. 12; *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; *ante* p. 786. We think that the time has arrived when railroad companies should be required to attach such couplers, and perhaps air-brakes or appliances equally safe and effective for checking the speed of moving trains on all passenger cars, since, as a rule, each corporation uses for carrying passengers none but its own conveyances, and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use. But while doubtless the day will soon come when they can be attached at comparatively small cost to all freight cars, it might seriously embarrass our commerce, involving an interchange for the purposes of expeditious transportation of vehicles between all the roads from Canada to Mexico, were every carrier required not only to incur the expense of buying the right and readjusting all of its own cars for the use of the improved fastening, but also to choose between refusing to receive a car of another company without incurring contingent liability for using it, since the liability of the corporation for such defects in those received from other companies is the same as for defects in its own: Patterson on Railroad Accident Law, 312; *Miller v. New York etc. R. R. Co.*, 99 N. Y. 657; *Jones v. New York etc. R. R. Co.*, 92 N. Y. 628.

It appears from the evidence, that the plaintiff was suddenly called upon on a very dark night to couple to the train two box-cars, standing upon the siding at Durham, one of which belonged to the defendant and another to a different company, and that when the train backed towards the train on the siding, he saw that the pin which he had adjusted with a stick in the draw-head of the car standing on the track would not go down into the link of the draw-head in the moving car, which he had also arranged with his stick, unless he should use his hand to push it down, and in this emergency he rushed in between the cars, as the conductor had ordered him to do whenever he failed in the effort to couple with a stick. After getting between the standing and the moving

car he discovered for the first time that there were no bumpers on either car. Bumpers are blocks of wood fastened to the end of a box-car, above and below, and on either side of the draw-head, and usually protrude about eight or ten inches, so that they serve the double purpose of preventing draw-heads from being broken by a collision, and of protecting brakemen who may be between the cars. Draw-heads have springs in them, and give way when they come into collision with each other, so that they cannot serve the purpose, like bumpers, of holding the cars apart.

In *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 467, where the facts were that a brakeman was injured in coupling two cars belonging to another company, the bumpers being only three inches long, the court said: "The defendant was under obligation to its employees to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars, and machinery for the discharge of their duties The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge; but these two cars did not belong to the defendant; they belonged to other companies and came to it loaded, and it was drawing them over its road. . . . It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. . . . When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employees. The employees can no more be said to assume the risk of such defects in foreign cars than in cars belonging to the company. . . . The defect here complained of was obvious, easily discoverable by the most ordinary inspection, and it seems it could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars, so as to give the bumpers sufficient width to afford the protection needed and intended."

The case being exactly in point, it seems not inappropriate to reproduce the language of Judge Earl from this elaborate opinion, instead of discussing the same question at greater length for ourselves. The general rule is, that when freight cars are obviously so defectively made, whether by a failure

to attach bumpers at all or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects: *Toledo etc. R'y Co. v. Fredericks*, 71 Ill. 294; *Chicago etc. R'y Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Wedgwood v. Chicago etc. R'y Co.*, 41 Wis. 478.

In *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 467, it will be observed that stress was laid upon the fact that the want of a bumper would have been discovered by an ordinary inspection, and in our case, as well as in that, the brakeman was suddenly called upon to pass between two cars, of the condition of which he could not have previously informed himself. Before daylight on a dark morning the duty devolved upon him of attaching a car, which it may be was never south of Wilmington until brought by some freight train with which plaintiff had no connection on the day before to the station where he found it.

In *Johnson v. Richmond etc. R. R. Co.*, 81 N. C. 453, where the injury to the plaintiff was caused by a defective rod which he had no reasonable opportunity to inspect, Chief Justice Smith, speaking for the court said: "Had the proper examination been made by the defendant, and the rod repaired and strengthened, the accident would not have occurred, and hence it must be ascribed to the defendant's own dereliction of duty. The fault lies with the company and it must bear the consequences." The defendant ought to have examined its own car, and, upon discovering its condition, bumpers could have been placed upon it at comparatively trivial cost, and the same duty of inspection devolved upon it when the other car was tendered to it, but upon examination it had the option, as will appear from the authorities already cited, of refusing to receive it at all, or of repairing it, so as to make it safe, after it was received.

So, apart from the special contract which is pleaded as a defense, the defendant is *prima facie* liable to answer in damages because of its negligence when its officers ought to have known of the defect and to have remedied it, and it has not relieved itself of this apparent liability by showing that the plaintiff knew or had opportunity to know the condition of the particular cars on the siding; but on the contrary the only testimony on the subject is that of plaintiff, to the effect that

he did not see the cars till he had put himself in danger, and then in the imperfect light discovered that there was no bumper on either of those between which he was already caught: *Crutchfield v. Richmond etc. R. R. Co.*, 76 N. C. 322; *Pleasants v. Raleigh etc. R. R. Co.*, 95 N. C. 195; Shearman and Redfield on Negligence, secs. 92, 94, 95; Cooley on Torts, 561. Leaving the agreement, designated as Exhibit "A," out of view, if there is any testimony tending to show contributory negligence, there was certainly no admitted state of facts which justified the court in withdrawing the case from the jury, and holding that in any aspect of the evidence the injury was caused by the fault of the plaintiff. In *Crutchfield v. Richmond etc. R. R. Co.*, 76 N. C. 322, it was expressly declared that though the servant assumed the risks of accident, incident to his service, he did not contract to excuse the negligence of the company, unless he knew of the danger to which he was exposed by its want of care, or might by reasonable diligence have known of it, and failed to give notice to his employer so that the defect might be remedied.

The case at bar is not one in which the plaintiff was injured by the fault of a fellow-servant, but by the negligence of the master in carelessly retaining on the line and receiving from other carriers palpably defective conveyances, the master being presumed to know of the danger, which could have been discovered by ordinary inspection, while the servant had no opportunity to know until it was too late to avoid it. The dangerous condition of the car was not, as in *Pleasants v. Raleigh etc. R. R. Co.*, 95 N. C. 195, known to both employer and employee, but only to the former. Where the rolling stock or machinery of a company is so defective in its construction that by an ordinary inspection the company could discover its condition, unless it appear that notwithstanding such want of care on its part the supervening negligence of the servant was the proximate cause of the injury complained of, the company is liable: *Wedgwood v. Chicago etc. R'y Co.*, 41 Wis. 478; *Hudson v. Charleston etc. R. R. Co.*, 104 N. C. 491; *St. Louis etc. R'y Co. v. Valirius*, 56 Ind. 511; *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 467. Another case precisely in point is *King v. Ohio etc. R. R. Co.*, 14 Fed. Rep. 277, in which Judge Gresham of the circuit court held that a brakeman in coupling cars had a right to assume that they are in good and safe condition, and is not negligent in running between cars without stopping to examine and see whether

the draw-heads are properly adjusted or not. No more is it his duty to examine bumpers on a dark night before essaying to couple cars.

The cars being palpably defective, and it appearing plainly that the company might, by ordinary care in inspecting them, have known their condition, the defendant still insists that, though the plaintiff may not have been negligent in knowingly incurring risk that he might have avoided, still he was violating a rule of the company of which he had express notice when he passed between the cars to adjust the coupling, and his want of care was therefore the cause of the injury. The authorities which we have cited fully sustain the position that in the absence of such an agreement the company would be deemed negligent, and the plaintiff would be held free from blame. In addition to those authorities we can fortify our position more strongly still by recurring to the principle that notwithstanding any real or supposed negligence of an injured plaintiff, a railway company is liable in damages if but for its own want of care the injury could have been avoided: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902; *Clark v. Wilmington etc. R. R. Co.*, 109 N. C. 430. If, therefore, we were to concede that the plaintiff was culpable in exposing himself to danger, the carelessness of the defendant would nevertheless be deemed in law the proximate cause of the injury.

Mr. Beach, citing with approval *Toledo etc. R'y Co. v. Fredericks*, 71 Ill. 294, says: "But when the cars are so constructed, the bumpers being of different heights, or being in any respect so made that the slightest indiscretion of the operative will prove fatal to him, it has been held that when the injury results from such causes the company is liable"; but the case of *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620, it would seem is so strikingly analogous as upon principle to be decisive of that at bar. If, then, the company was held to be wanting in ordinary care because the cars provided did not so fit each other that the bumpers would keep them apart and prevent collisions, it would seem where the failure to place any bumpers at all on cars is the proximate cause of a collision in which a brakeman is injured, there would be still more palpable proof of negligence. Justice Ruffin stated the fact to be, as appeared from the plaintiff's testimony on the trial, "that the brakeman was under the immediate direction and order of one Garrison, who was

the engineer and conductor of the defendant's freight train," and that while executing the order of the conductor, as in our case, the brakeman "was injured in the manner complained of, by a collision of two cars, which collision resulted from the fact that the cars were so constructed that their bumpers did not correspond or fit one another, as they should have done in order to prevent the cars coming in too close contact, which defect was unknown to plaintiff, and but for which he would not have been injured." This court held that the defects in the cars were such as to establish negligence on the part of the defendant because the defect was so obvious as to be seen on inspection, and to make it incumbent on the company to show that some subsequent carelessness on the plaintiff was the proximate cause of the injury. The statement as to the relations of the conductor and brakeman was much more meagre, it is true, than in *Patton v. Western etc. R. R. Co.*, 96 N. C. 455, since there the superior, discharging himself the double duties of conductor and engineer, was expressly shown to have the power to employ and discharge the laborers subject to his orders.

The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakeman on his train, is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher officer than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior, as it is a matter of universal knowledge is the true state of facts on all railroads, is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to couple cars in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency and discharged from the service of the company? If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to manifest peril, or chose to subject himself to danger when an-

other safe mode of discharging his duty was open to him, as in *Chambers v. Western etc. R. R. Co.*, 91 N. C. 475.

The elaborate opinion of Justice Field in *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377, in which he reviews the question, Who are servants engaged in a common employment? in the light of all the previous decisions in America and England, contains the clearest and most philosophical discussion of the subject to be found in any authority to which we have had access. He announces the conclusion of that court as follows: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned."

"The true view," says Wharton, *Law of Negligence*, sec. 232, "is, that as corporations can only act through superintending officers, the negligence of those officers, with respect to other servants, are the negligences of the corporation." The command of the conductor to the brakeman to go between the cars when he could not couple them otherwise, was one to which unhesitating obedience was expected and demanded. The giving of such an order by the conductor ought, upon the plainest principles of right and justice, to be declared a waiver of the regulation by an officer who is the representative of the corporation. That a brakeman feels impelled to obey the orders of the conductor, no observant person can deny; and since we can take judicial notice of a relation so common and well understood, it would be a voluntary preference of fiction to fact were we to adhere to an arbitrary rule founded in a supposed reason that we know does not exist. A brakeman does not contract to incur the risk of serving under a conductor who will order him to disobey the regulations of the

company and leave him to choose on the instant between observing the rules and obeying his superior.

The supreme court of Georgia, in *Central R. R. Co. v. De Bray*, 71 Ga. 406, held that while neither a conductor or any other officer had a right to order an employee to get on or off a moving train, and the employee was not bound to obey it, yet where the conductor did give the order and the brakeman obeyed it, the act of the conductor was the act of the corporation, and the corporation could not escape responsibility for its own wrong. The court held in that case that it was immaterial what the rules of the company were; and so in our case, where the brakeman was ordered to jump between cars instead of from the top of a car, the same principle should prevail.

The supreme court of South Carolina held, in *Boatwright v. Northeastern R. R. Co.*, 25 S. C. 129, that "the conductor of a train is the representative of the company and not a fellow-servant with other employees operating the same train under his orders." That case was exactly in point, as the conductor had ordered the brakeman to go between cars because of uneven couplers on freight cars. The same principle is decided in *Coleman v. Wilmington etc. R. R. Co.*, 25 S. C. 446; 60 Am. Rep. 516. It has been repeatedly held that an engineer in charge of a train, discharging the duties usually devolving on a conductor in addition to managing the engine, is not a fellow-servant of a brakeman: *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135. The American rule, as distinguished from the English, is that a servant entrusted with the general management of the master's business, or of employees in a particular department, or on detached service in charge of the train or body of laborers, is not a fellow-servant of those who are employed under him and subject to his orders: *Augusta Factory v. Barnes*, 72 Ga. 217; 53 Am. Rep. 838; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; *Chicago etc. R. R. Co. v. Swanson's Adm'r*, 16 Neb. 254; 49 Am. Rep. 718; *Burlington etc. R. R. Co. v. Crockett*, 19 Neb. 138; *Shearman and Redfield on Negligence*, sec. 226.

It will be conceded that though the owner and manager of a manufacturing establishment should make a rule and cause every employee to sign it, to the effect that the employee would not pass between certain machines, go into an engine-room, or expose himself to any specified danger connected

with the machinery of the mill, and would hold the owner discharged in advance for any liability growing out of such exposure, yet if the manager should, in the face of the rule, order the servant who signed it to disobey it, and his obedience to orders should expose him to a danger caused by defects in the machinery that on an ordinary inspection would have been obvious to the master, though not so readily discoverable to the servant acting instantly on the order, it would scarcely be contended that the superior who had made the regulation would not thus waive its observance. A corporation is usually governed by its directors, but they may shift its responsible management by such a variety of orders, by-laws, and regulations as to make it impossible to discover a real tangible directing head. If, as authority and reason clearly dictate, we consider a conductor in charge of a train as representing the intangible head of the company, then his order is as much a waiver of the regulation as that of the owner or head of a mill.

But speaking for a minority of the court only, it seems that there should be but little difficulty in arriving at the same conclusion by the solution of another question, to wit, whether, in consideration of receiving employment, a brakeman can by written agreement "waive the liability" of the company incurred by furnishing cars without bumpers, and which cannot be coupled with a stick, in the event that he shall be injured in the attempt to fasten the couplings of such cars, under the command of the conductor in charge of the train, with his hands instead of using his stick, as the rule of the company requires, and when the injury is due to the negligence of the company. It is settled as the almost universal rule in America that though a common carrier of freight by contract upon consideration may relieve itself of the full measure of responsibility as an insurer, no limitation can in that way be placed upon its liability for its own negligence: *Smith v. North Carolina R. R. Co.*, 64 N. C. 235; 4 *Lawson on Railroads*, sec. 1840; *Lawson on Contracts of Carriers*, secs. 29-67. The same rule applies to agreements made by common carriers of passengers purporting to restrict their liability for injuries caused by their own negligence. Such contracts are void as against the public policy of the law: 4 *Lawson on Railroads*, sec. 1913. This stringent rule of liability is said to rest upon the duty of the government to give unrestricted protection to the lives and limbs of its citizens:

Lawson on Contracts of Carriers, secs. 212-220. It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence even when it causes death, and it has been so held, as far as our investigations have extended, in all of the courts except the supreme court of Georgia: *Railway Co. v. Spangler*, 44 Ohio St. 471; 58 Am. Rep. 833; *Kansas Pac. R'y Co. v. Peavey*, 29 Kan. 169; 44 Am. Rep. 630; *Little Rock etc. R'y Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245; *Memphis etc. R. R. Co. v. Jones*, 2 Head, 517; *Roesner v. Hearmann*, 10 Biss. 486; 8 Fed. Rep. 782; 1 Lawson on Railroads, sec. 318. It is difficult to draw a distinction between contracts affecting only the safety of goods or animals, or those affecting the lives and limbs of passengers, and those which vitally concern another large class of human beings. If public policy prohibits the recognition of the validity of a contract limiting liability for a paying passenger, or, as most authorities in this country maintain, even one riding on a free pass, upon what principle can the courts refuse to extend the same protection to a class of people who are much more exposed to danger, and much more liable to be influenced to sign such agreement?

For the reasons given, we think that the court below erred in holding that the plaintiff could not recover. This case should have been left to the jury, and the judgment of nonsuit will be set aside and a new trial granted.

BURWELL, J., dissents.

SHEPHERD, C. J., concurring: I concur in the conclusion reached by the court, but not on the ground that the regulation in question was an unreasonable one. It was not a stipulation against negligence in the ordinary sense of the term, and as long as it remained in force the defendant did not owe to the plaintiff the duty of providing bumpers for its cars. The essential element of negligence is a breach of duty, but, in order to recover, it is not enough for the plaintiff to show a simple breach of duty, but he must also show that the defendant owes the duty to him. 1 Shearman and Redfield on Negligence, sec. 8; Beach on Contributory Negligence, sec. 6; *Emry v. Roanoke etc. Co.*, 111 N. C. 94.

In the decisions cited, where a recovery was had for negligence in not furnishing bumpers, there was either no regula-

tion like that in present case, or such regulation had been waived. I cannot understand how it was the duty of the defendant to provide against an accident which could not possibly have happened but for a violation of its reasonable regulations. However negligent, then, as to others the defendant may have been in not seeing that the cars were provided with bumpers, such negligence was not actionable by this plaintiff if his injuries were caused by his disobedience of an existing regulation (known and agreed to by him) forbidding him from going between the cars under any circumstances for the purpose of coupling, etc. The evidence, however, tended to show that there was a waiver of the regulation by the conductor in charge of the train, and, in view of the authorities cited, and the convincing reasons given in the opinion, I think that such a waiver was, for the purposes of this action, binding on the defendant. It is upon this ground that I concur in the disposition made of the appeal.

MACRAE, J., concurring in the opinion of the chief justice.

MASTER AND SERVANT — DEFECT IN MACHINERY — BURDEN OF PROOF.

A servant must show that the injury is more naturally to be attributed to the master's negligence than any other cause, in an action by him against the master for a failure to provide suitable appliances: *Griffin v. Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526. In the case of an injury to an employee of a railroad, the plaintiff must affirmatively prove the company's negligence in order to recover: *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and note.

MASTER AND SERVANT — DUTY OF MASTER TO FURNISH SAFE MACHINERY. — A railroad cannot be regarded as guilty of negligence *per se* from its failure to provide a certain appliance, though a majority of the other roads have adopted it: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863, and note as to the duty of a railroad to furnish the latest and safest appliances. A railroad company is not bound to furnish its employees with the most improved machinery, so long as what it furnishes is reasonably safe and suitable for the work to be performed: *Galveston etc., R'y Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781, and note; *Leligh etc. Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680, and note; *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321, and note; *St. Louis etc. R. R. Co. v. Davis*, 54 Ark. 389; 26 Am. St. Rep. 48. See extended notes to *Rogers v. Ludlow Mfg. Co.*, 59 Am. Rep. 75; *Bojus v. Syracuse etc. R. R. Co.*, 57 Am. Rep. 727; *Sweeney v. Berlin etc. Envelope Co.*, 54 Am. Rep. 726; *Kelley v. Silver Spring Co.*, 34 Am. Rep. 621; *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 213; *Bazell v. Leconia Mfg. Co.*, 77 Am. Dec. 218.

RAILROADS. — DUTY TO FURNISH SAFE AND SUITABLE CARS for its employees to work with: See *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; *Gutridge v. Missouri Pac. R'y Co.*, 94 Mo. 468; 4 Am. St. Rep. 392, and note.

RAILROADS. — A brakeman injured while attempting to make a dangerous coupling, who was obeying the orders of the conductor in doing so, may recover for the injury: *Denver etc. R. R. Co. v. Simpson*, 16 Col. 55; 25 Am. St. Rep. 242, and note with cases collected. See also *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note.

RAILROADS — FELLOW-SERVANTS. — CONDUCTOR AND BRAKEMAN OF SAME TRAIN ARE NOT: See *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note; *Coleman v. Wilmington etc. R. R. Co.*, 25 S. C. 446; 60 Am. Rep. 516, and note; *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745; 49 Am. Rep. 401, and note.

HARDY v. GALLOWAY.

[111 NORTH CAROLINA, 519.]

DEEDS — VOID LIMITATIONS AND CONDITIONS. — A reservation and condition in a deed by which the vendor reserves to himself, his heirs and assigns, the right to repurchase the land when sold, with the further stipulation that if the vendee conveys the land without giving the vendor the privilege of repurchasing the deed shall be void, is itself void for uncertainty as to time and manner of performance, repugnant to the grant, and opposed to public policy forbidding restrictions on the right of alienation.

TRIAL of title to land. On October 22, 1884, the defendant and his wife conveyed the land in dispute to J. T. Evans for and in consideration of the sum of twenty-five dollars, which were never paid. The deed was duly recorded, and contained the following clause: "The said J. B. Galloway and wife, Alice L. Galloway, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the said Jefferson Evans conveying a title for said land either by deed or mortgage to any person without first giving J. B. Galloway and wife and their heirs and assigns the privilege of repurchasing the same, renders this deed null and void, otherwise to remain in full force." On the thirteenth day of June, 1887, the said Evans executed and delivered to the plaintiff a mortgage deed conveying the said land to secure the payment of a bond for \$325, which have never been paid. Defendant, upon hearing of the mortgage deed, entered into possession of said land for an alleged breach of condition in his deed to Evans, and remains in possession, claiming the land by reason of said alleged breach. Judgment for plaintiff, and defendant appealed.

J. B. Yellowley, for the appellee.

SHEPHERD, J. Considered either as a conditional sale or a contract to reconvey, his honor was entirely correct in holding as void for uncertainty the provision in the deed respecting the right of the grantor to repurchase the land when sold. No time is fixed for performance, nor is there any stipulation whatever as to the price to be paid.

The provision, not being a limitation, can therefore only take effect, if at all, as a condition subsequent, and viewed in this light we cannot hesitate in deciding that the restriction upon alienation attempted to be imposed after the grant of the fee is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. Ever since the statute of *quia emptores*, the right of alienation has been considered as an inseparable incident to an estate in fee: Coke on Littleton, 436; Williams on Real Property, 61, 62; 1 Washburn on Real Property, 79; and except in some cases where the restriction is only partial, the law does not recognize or enforce any condition which would directly or indirectly limit or destroy such a privilege — *iniquum est ingenuis hominibus non liberam esse rerum suarum alienationem*. Accordingly, it has been held by this court that a condition that a devisee in fee, shall not sell or encumber his land before attaining the age of thirty-five is void, "because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies": *Twitty v. Camp*, Phill. Eq. 61. To the same effect has it been ruled as to a condition that a devisee in fee shall make oath "that he will not make any change during his life" in the testator's will respecting his property: *Taylor v. Mason*, 9 Wheat. 350; or that he shall not offer to mortgage or suffer a fine or recovery: *Ware v. Cann*, 10 Barn. & C. 433; or that he shall contract in writing not to alienate before the proceeds of certain realty are paid to him: *Mandlebaum v. McDonell*, 29 Mich. 78; 18 Am. Rep. 61; or that land devised to a number of persons shall not be divided: *Smith v. Clark*, 10 Md. 186.

Such conditions are not sustained where they "infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience": 4 Kent's Com., 131; Bacon's Abridgment, tit. Conditions; Sheppard's Touchstone of Common Assurances, 131.

"A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor anything implied

which is of its nature incident and inseparable from the thing granted": *Starkie v. Butler*, Hob. 170.

While unable to find any decision exactly in point, we feel assured that our case falls within the principle stated and illustrated by the foregoing authorities. The restriction is certainly inconsistent with the ownership of the fee as well, it would seem, as against public policy. The right to repurchase is of indefinite extent as to time (it being reserved to the grantors, their heirs or assigns), and may be exercised whenever the property is sold, although no amount is fixed upon as purchase-money. In other words, we have an estate in fee without the power to dispose of or encumber it unless first offering it for no definite price to the grantors, their heirs or assigns. The condition is repugnant to the grant, and therefore void. Even if the right to repurchase could be sustained, the defendant has no cause of complaint, inasmuch as the court, in decreeing foreclosure, has ordered that thirty days' notice of the sale shall be personally served on him.

The exception to the insufficiency of the description in the mortgage from Evans to the plaintiff is plainly untenable: *Henley v. Wilson*, 81 N. C. 405; *Euliss v. McAdams*, 108 N. C. 507, and the cases cited.

Neither is there any merit in the other exception as to the refusal of the court (considering the admissions in the answer) to require the plaintiff to introduce the deed from Galloway to Evans.

The judgment must be affirmed.

DEEDS — VOID RESERVATIONS IN. — Conditions or reservations in a deed which are repugnant to the estate granted are void: Note to *Nunnery v. Carter*, 78 Am. Dec. 235; *Pyncheon v. Stearns*, 11 Met. 312; 45 Am. Dec. 210, and note; *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404, and note. So a condition in a deed that the grantee shall not alien is void because it is repugnant to the estate: *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470, and extended note; *Munroe v. Hall*, 97 N. C. 206.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

EX PARTE MCNEELEY.

[36 WEST VIRGINIA, 84.]

CRIME, PLACE WHERE COMMITTED. — If a man is unlawfully struck or injured in one state or county, from which he dies in another, the courts of the former, in the absence of any controlling statute, are the only ones which can inquire into and punish his offense.

CONFLICT OF LAWS. — The criminal laws of a state have no force beyond its territorial limits.

CONSTITUTIONAL LAW — STATUTE AUTHORIZING THE PUNISHMENT OF A CRIME COMMITTED BEYOND THE STATE. — A statute declaring that if any person is struck or poisoned out of this state and dies by reason thereof within this state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or the poison administered, in the county in which the person so struck or poisoned may die, is not unconstitutional, though the constitution of the state declares that the trial of crimes shall be in the county where the alleged offense was committed.

CONSTITUTIONAL LAW — NATIONAL CONSTITUTION, WHEN DOES NOT CONTROL PROCEEDINGS IN STATE COURTS. — The provisions of section 2 of article 3 of the constitution of the United States declaring that the trial of crimes shall be held in the state where they shall have been committed, and of the Sixth Amendment guaranteeing that in all criminal prosecutions the accused shall enjoy the right to trial by impartial jury of the state and district wherein the crimes shall have been committed, apply only to proceedings in the courts of the United States for offenses against the United States.

Vinson and McDonald, for the plaintiff in error.

Attorney-general Alfred Caldwell, for the state.

BRANNON, J. Stuart McNealey filed his petition in July, 1891, in the circuit court of Logan County, praying for a writ of *habeas corpus* to discharge him from the jail of that county,

and upon demurrer the court refused to award the writ, and dismissed the petition, from which action of the court he has obtained this writ of error

The petition states that in 1891 Frank Hurley died from gunshot wounds inflicted by McNeeley while both were in the state of Kentucky, standing between high and low water marks, about ten feet above the water's edge, on the Kentucky side of the Tug Fork of Big Sandy river, formerly called the "East Fork;" that Hurley died in Logan County; that McNeeley is confined in the jail of Logan County upon criminal process issued by a justice of that county to answer for the murder of Hurley; that the state of West Virginia has no jurisdiction over said offense, because it was committed in Kentucky; and it prays that a writ of *habeas corpus* issue for his relief, and that he be discharged from custody. The petition does not state anything as to McNeeley's citizenship.

The boundary line in that locality between the states of West Virginia and Kentucky is as it was between Virginia and Kentucky at the date of the formation of West Virginia: Const. W. Va. art. 2, sec. 1; Code Va. 1860, c. 1, sec. 6. The stream called "Tug Fork" is here the boundary, and the line between the states is its middle: *Handly's Lessee v. Anthony*, 5 Wheat. 374; 1 Bishop's Criminal Law, sec. 150. I think it clear that the mortal blow was given within the territory of Kentucky; but Hurley died within the territory of West Virginia, and under our code, though the mortal blow was given in Kentucky, this state has jurisdiction to try McNeeley, if the provision be valid.

Chapter 144, sec. 6, is as follows: "If a person be stricken or poisoned in, and die by reason thereof out of, this state, the offender shall be as guilty, and be prosecuted and punished, as if the death has occurred in the county in which the mortal stroke or poison was given or administered; and if any person be stricken or poisoned out of this state and die by reason thereof within this state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or the poison administered, in the county in which the person so stricken or poisoned may so die."

It is relied upon as a chief point in the prisoner's case that the latter clause of said code section is in violation of sec. 14, art. 3, of the state constitution, and sec. 3, art. 3, of the of the federal constitution. Section 14, art. 3, of the state

constitution provides that the trials of crimes shall be "in the county where the alleged offense was committed." This raises the question, where was this offense committed, in a legal point of view, in Kentucky, where the bullet struck its victim, or in West Virginia, where he died? We must look to the common law to answer this outside the statute. The ancient common law is said to have propounded the very unreasonable principle that, if a person be wounded in one county and die in another, his murderer could be tried in neither. 1 Hawk. P. C. c. 13, sec. 13, thus states it: "It is said by some that the death of one who died in one county of the wound given in another was not indictable at all at common law, because the offense was not complete in either county, and the jury could only inquire of what happened in their own county; but it has been holden by others that, if the corpse had been carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county." In volume 2, c. 25, sec. 36, Hawkins states that as the more general opinion.

Chitty says, in 1 Criminal Law, *178, that where the blow and death were in different counties "it was doubted" whether the murderer could be punished in either.

Blackstone says he could be punished in either county: Black. Com., bk. 3, p. 303.

But that great English authority on criminal law, Lord Hale, vindicates the ancient common law from this reproach, saying: "At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either; but the more common opinion was that he might be indicted where the stroke was given, for the death is but a consequence, and might be found, though in another county." So says East 1 P. C., c. 5, sec. 123.

In *John Lang's Case*, Y. B. 6 Hen. VII., p. 10 (A. D. 1490), where the blow and death were in different counties, the court said: "In this case it hath been used after the death to bring the dead man, to wit, the body, into the county where he was struck, and then to inquire and find that he was struck and died of that"; and in a case in 1491. Tremaille, J., said, where the blow and death were in different counties: "It seems it is not material where he died, for the striking is the principal point; but it requires death, otherwise it is no felony; but whether he died in one place or another is not material": Y. B. 7 Hen. VII., p. 8.

Abbott, C. J., in *Rex v. Burdett*, 4 Barn. & Ald. 169, held Hale's authority as superior in this matter.

Wharton in 1 Criminal Law, sec. 292, says: "By the early English common law, the place where the mortal stroke was given had jurisdiction in cases of homicide. As there seemed, however, to be doubts in the cases in which the blow was in one jurisdiction and the death in another, the statute 2 & 3 Edw. VI., c. 24, was passed, the effect of which though inartificially drawn, is to give the place of death jurisdiction. This statute has been held to be part of the common law in several states in this country; but even where it is in force it does not, according to the better opinion, divest the jurisdiction of the place where the blow was struck": 1 Bishop on Criminal Procedure, sec. 52. I think the proposition that the prosecution may be where the blow is given, no matter where the death, was the rule under the ancient common law, and certainly under the modern common law as held in American courts. The true view is that the blow is murder or not, according as it produces death or not within a year and a day; and in all cases an indictment lies in the county where the blow was given: 1 Bishop on Criminal Procedure, sec. 51.

President Garfield received his wound in the District of Columbia, but died in New Jersey; and under a statute that any one "who commits murder within any fort, arsenal, magazine, dock-yard, or any other place or district or country under the exclusive jurisdiction of the United States, . . . shall suffer death," it was contended that to say one commits murder within a district the blow and death must both take place there, but on full consideration it was held that the crime was committed within the district, because the blow was there: *United States v. Guiteau*, 1 Mackey, 498; 47 Am. Rep. 247.

In *Riley v. State*, 9 Humph. 646, where the death and blow were in different counties, the Tennessee court, under a statute providing that trial should "be in the county where the offense may have been committed," said it repealed the statute of 2 & 3 Edw. VI., that the blow was the offense, the death the mere result; and that it never was the rule under the old common law that where death and blow were in different counties the trial could be in neither, and the trial must be in the county where the blow was given.

In *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744, it was held that a statute authorizing prosecution for murder in the

county where the blow was struck, though death was out of the state, was valid, the court saying that the wound was the offense, death a sequence, rather than a constituent elemental part, of the crime, and that without the statute the state had jurisdiction.

In *State v. Gessert*, 21 Minn. 369, a person was stabbed in Minnesota and died in Wisconsin, and it was held that the death in Wisconsin was only a consequence of the act committed against Minnesota, and he was triable there. It was not based on a statute.

In *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620, the doctrine is asserted as common law that where the blow is given is where the crime is committed.

People v. Gill, 6 Cal. 637, holds the crime is where the blow is, and where the place of trial is changed after the blow by law, it must be at the place fixed by law at date of blow.

In *State v. Bowen*, 16 Kan. 475, where the indictment did not charge death to have occurred in the state, where there was no statute on the question, Brewer, J., said that, as the only act the defendant does towards the death is giving the blow, that place is the place where he commits the crime, and that the subsequent wanderings of the wounded man, uninfluenced by the defendant, do not change the place of the offense; that death simply determines the character of the crime in giving the blows, and refers back to the act, and gives it quality.

The case of *Commonwealth v. Linton*, 2 Va. Cas. 205, is said in *Hunter v. State*, 40 N. J. L. 514, to be the only case holding that where a blow is given in one state, followed by death in another, there can be no prosecution in the state of the blow. No reasons are given by the court. I do not see how that decision was reached, except on the untenable ground of the alleged rule of the old common law, that where the blow is in one county, death in another, neither can try the case; by parity of reasoning, where blow is in one state, death in another, the state where the blow was given cannot prosecute. That must have been the reason, as Hawkins and Chitty, referring to that rule, are cited, and Blackstone, Hale, and East, denying it, are not referred to. The statute 2 & 3 Edw. VI., to remove the doubt about that rule, was not then in force, all British statutes having been repealed by the act of 27th December, 1792: 1 Tuck. Bla. Com. 8; 1 Rev. Code, 1819, c. 40. The fact that it is the place of the blow where the crime

is committed is further sustained by the well-settled proposition that there can be no prosecution at the place of death merely, unless a statute authorizes it: 1 Wharton's Criminal Law, sec. 292.

The said statute of Edward was in force in Virginia under the ordinance in convention in May, 1776, declaring operative in Virginia all acts of the English parliament of a general nature, not local to Great Britain, passed since the fourth year of the reign of King James I., when the Virginia bill of rights of June 12, 1776, was adopted; and it may be said that, as the statute of Edward allowed a prosecution in the county of death, thus making that county, in a legal sense, the county where the offense was committed, we must interpret the constitutional clause in question by the light of that statute.

If the Virginia bill of rights, which remained unchanged down to the formation of this state, had used the word "county," as does ours, there would be force in the suggestion greater than there is; but it provided that an accused should be tried by a "jury of his vicinage." Blackstone, in book 3, page 350, merely remarks that the word "visne," from which juries were drawn at common law, was interpreted to mean "county." This word "vicinage," borrowed from old common law, is not defined in Bouvier or Black in their law dictionaries as meaning "county," but "neighborhood, vicinity." It did not mean "county." In discussing the matter *de quo vicineto*—out of what neighborhood—the jury shall come, 3 Coke on Littleton, 464, states that it must be "of that town, parish, or hamlet, or place known out of the town, etc., within the record, within which the matter of fact issuable is alleged, which is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact."

Chitty (1 Crim. Law, 500) says the jury at common law must come "from the very *ville* or place where the offense was committed," and that there was a challenge for want of hundreders on the jury.

Far back, under the common law, murders were tried just where they occurred, by close neighbors, acquainted with the facts, as jurors upon view of the body (*super visum corporis*). That the vicinage was the neighborhood, not the county, is plain from Proffatt's Trial by Jury, sec. 80, and Thompson on Trials, sec. 1. So it will appear from Hargrave's note to 3

Coke on Littleton, 464, where it will also appear that, while a statute in Anne's reign altered this in civil cases, allowing the jury from the body of the county, it remained unaltered in criminal cases when Hargrave wrote the note, and was not changed as to felonies until 6 Geo. IV., c. 50, sec. 13; the 24 Geo. II., c. 18, only applying to actions on penal statutes.

Thus at the date of the adoption of the Virginia bill of rights "vicinage" meant "neighborhood," "vicinity," not "county." Judge Green so thought, for in the opinion in *State v. Lowe*, 21 W. Va. 783, 45 Am. Rep. 570, he says the word "vicinage," as used in the Virginia bill of rights, meant "vicinity," and was not the equivalent of "county," and he ventures the opinion that under it the statute allowing a trial in either county, where an offense occurred within one hundred yards of a line between two counties, would be constitutional, but not so under our constitution.

The Massachusetts court, in *Commonwealth v. Parker*, 2 Pick. 550, held that, where the constitution used the word "vicinity" in providing for the place of trial it was not equivalent to "county."

My own investigation of the old common-law books brings me to the same conclusion with Judge Green. Therefore, no light upon the construction of the clause in question in our constitution is shed by the statute 2 & 3 Edw. VI. When our constitution was adopted, that statute was not law, because of the repeal of English acts in 1792; and, if that act had not repealed it, the closing chapter of the Code of 1849 would have done so.

Again, I doubt whether the statute of Edward would apply anyhow, because it provided only, the blow and death both being in the kingdom but in different counties, that the county of death might take jurisdiction, not applying to the case where the blow was out of the kingdom but the death within; and that this is so is apparent from the fact that parliament passed a statute in second year of George II., providing where trial should be where blow and death happened, the one or the other, outside the kingdom: 1 Hawk. P. C. 94; 1 Chitty on Criminal Law, *179. The case of a thief carrying goods from county to county or from state to state, and punishable in either, is not analogous. He himself, every moment, everywhere he goes, is actively committing crime.

Thus, I should think, as a common law the place of the mortal stroke is the place where the offense is committed, and

the place of death is not, and can only be made the place of trial by statute, when our constitution guaranties a trial in the county where the offense is committed it means the place where the stroke was given. Then can a state punish an act done outside its territory? It seems to be an axiom that a state's criminal law is of no force beyond its limits: Wharton on Conflict of Laws, sec. 18; Story on Conflict of Laws, sec. 621; 1 Bishop on Criminal Laws, sec. 110. Story, J., said in *The Apollon*, 9 Wheat. 362, that laws of a country "must always be retriected in construction to places and persons upon whom the legislature have authority and jurisdiction."

It can be asserted that a crime committed in another country, and in violation of its laws, cannot, by legislative fiction or construction, be considered an offense in another country.

This doctrine does not, however, apply to cases where a crime is perpetrated partly in one and partly in another country, provided, as Mr. Bishop says, "what is done in the country which takes jurisdiction is a substantial act of wrong, not merely some incidental thing, innocent in itself alone." But this brings us back to the same question again.

The American states are distinct and separate, as between themselves, as to the administration of criminal law. Wherein a state assumes criminal jurisdictions over crimes done within another it would seem to be without power. If Hurley had died in Kentucky, could this state try McNeeley, even if she had a statute extending so far? Could she thus exercise power over soil, persons, and acts without her territorial limits?

There are two lines of reasoning applicable to this case. One is that while the blow is the beginning in the criminal transaction, it is only the beginning. The wound is because of the wrong in planting the bullet in the body, that wrong yet operating towards the consummation, which is the death; that the prisoner's agency is yet active in all this, in the languishing, in the decay of the physical strength, in the dying by reason of his wrong that started the process ending in death; and that its energy ceased not for a moment until death; and that this caused the death.

The other is that the shot that planted the bullet is the wrong. With it the prisoner's actions began and ended. The suffering and dying are acts not his, but acts of the deceased; mere consequences or results of his act. He is answerable only because he started the force causing death; that he struck

no blow in this state, and committed no breach of her peace or sovereignty.

The former view is ably held in *Commonwealth v. Macloon*, 101 Mass. 1; 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 320; and *Commonwealth v. Parker*, 2 Pick. 550; while the latter view is held in 1 Bishop on Criminal Law, secs. 112-116, and Bishop on Criminal Procedure, secs. 51, 52, and *State v. Carter*, 27 N. J. L. 500.

I must, for myself, say that I have not been able to relieve myself from serious doubt as to the validity of the second clause of section 6, c. 144, code, subjecting to punishment here a person striking a blow outside of this state, where the consequent death occurs within this state, because I regard the crime as committed where the mortal wound is inflicted. Under this statute, a man dealing a blow in California or Australia, if the stricken person comes here and dies, may be tried here, far away from the scene of the tragedy, where his character is known, far away from friends to aid in his defense, far away from the witnesses of the act, with no power in this state to compel the attendance of those witnesses. The law of California or Australia may punish the act under the same facts in a certain way; ours with more severity. Does the prisoner know of our law when he strikes the blow? Is he bound to know our law? He is not. Neither in fact does he know, nor in theory is he bound to know, our law when he delivers the blow. He cannot tell into which one of the many countries of the earth the victim may wander within the year and day before death, and he cannot study the laws of all states.

True, the state may as much need witnesses from the place of death to prove death and dying declarations, but the prosecuting need is not to be compared to his need; and the state has subordinated her convenience and facility of prosecution by guarantying him by her laws compulsory process for evidence and trial in the county where the offense is committed.

I cannot see very clearly that the man from California or Australia has a trial in the county where the offense is committed. Mr. Bishop in reasoning against the enforcement of such laws, says it is not a question of constitutional law, but that such laws ought to be construed in harmony with the law of nations, and their enforcement denied, except as to our own citizens. This is not without force. It may be said with some plausibility that the constitutional provision applies

only where both blow and death occur within the state, and only selects what county shall hold the trial; and that it does not apply where part of the offense is outside the state. But I regard it a question of jurisdiction arising under the constitution; and that nowhere in the state can trial be had except in that county where the offense is committed, and if not enough of the act occurred in the county of death to enable us to say that the offense was committed there, then it has no jurisdiction, nor has any county in the state; for I construe the clause as meant to be co-extensive with all criminal acts justiciable under the power of the state.

Mr. Bishop, the great author, while resisting such statutes with reasoning which seems to me very strong and satisfactory, yet says that the question is not one of constitutional law, but one of international law; and properly admits that, if a legislature command a court to violate international law, it is bound to do so. See Endlich's Interpretation of Statutes, sec. 175. If then he is right and the question is not one of constitutional law, this court cannot, on his theory, refuse to execute this law.

Virginia, as far back as 1840, enacted that if a blow be given in the state, and death result in another state, prosecution might be in Virginia, in the county of the blow; but, though her criminal law has undergone several revisions, and though England and several of the states of this Union had legislation punishing as murder cases where the blow was without but death within England or the state, Virginia has never adopted it. Did she doubt its validity? It was inserted in our code in 1882; but though I have doubts on the subject, we must not forget that the legislature, composed of many men of legal ability and learning, and vested by the people with the law-making power of the state, has approved this provision. A court must be slow and cautious to overthrow its action. In none but a case of very plain infraction of the constitution, where there is no escape, will or ought a court to do so. To doubt only is to affirm the validity of its action. I resolve my doubt in this way.

I shall add that I find no case directly holding such legislation void, though a number of cases afford ground for logical deduction to that effect. They are cited above. But there are two cases asserting its validity. In *Tyler v. People*, 8 Mich. 320, a man was punished in Michigan under such an act for a blow dealt in Canada, one judge dissenting; and in

Commonwealth v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, a British subject and a citizen of Maine were convicted for murder where the act was on a British vessel at sea, but the party died in Massachusetts. Though not the point of decision, it is conceded that such legislation is valid, in the opinions in *Steerman v. State*, 10 Mo. 503; *State v. Kelly*, 76 Me. 331; 49 Am. Rep. 620; and by Mr. Justice Bradley in note to *United States v. Guiteau*, 47 Am. Rep. 261.

As to the contention that the statute before us violates section 3 of article III. of the constitution of the United States, I need only say that that section applies to United States court proceedings only, relating only to proceedings for offenses against the United States. So does amendment six: *Fox v. Ohio*, 5 How. 410; *Cook v. United States*, 138 U. S. 157, 181; *Barron v. Baltimore*, 7 Pet. 243; *Spies v. Illinois*, 123 U. S. 131. Therefore the judgment of the circuit court denying the writ of *habeas corpus* is affirmed.

Affirmed.

CRIMINAL LAW — JURISDICTION — PLACE WHERE CRIME COMMITTED. — In cases of homicide, when the mortal blow was struck in Louisiana, but the death occurred in Mississippi, the crime may be prosecuted in the Louisiana parish where the blow was given: *State v. Foster*, 8 La. Ann. 290; 58 Am. Dec. 678, and note; *Green v. State*, 66 Ala. 40; 41 Am. Rep. 744; and see *United States v. Guiteau*, 47 Am. Rep. 261, and note; note to *Myers v. Myers*, 58 Am. Dec. 693. The venue in a criminal case is to be laid in the county where the offense was committed: *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122. The state of West Virginia has jurisdiction of a criminal offense committed on the Ohio river within low-water mark, opposite the territory of West Virginia, although the boat was moored to the bank within the boundaries of Ohio: *State v. Plants*, 25 W. Va. 119; 52 Am. Rep. 211. One who does a criminal act in one county or state may be held liable for its continuous operation in another; *Commonwealth v. Macloon*, 101 Mass. 1; 100 Am. Dec. 89, and note.

CRIMINAL LAW — EXTRATERRITORIAL EFFECT OF PENAL STATUTES. — The penal statutes of a state have no effect beyond the limits of the state which enacted them: *Suffolk Bank v. Kidder*, 12 Vt. 464; 36 Am. Dec. 354; note to *Myers v. Myers*, 58 Am. Dec. 693. See also note to *Attrill v. Huntington*, 14 Am. St. Rep. 350, discussing the question as to whether the courts of one state will attempt to enforce the penal statutes of another.

CONSTITUTIONAL LAW — FEDERAL CONSTITUTION, WHEN DOES NOT EFFECT PROCEEDINGS IN STATE COURTS. — Article 7 of the amendments to the national constitution establishes a limitation to the mode of trial in the federal courts, but not in the state courts: *State v. Keyes*, 8 Vt. 57; 30 Am. Dec. 450, and note; and likewise, article 4 of the amendments to the constitution of the United States has no application to proceedings under the authority of a state: *Reed v. Rise*, 2 J. J. Marsh. 44; 19 Am. Dec. 122; see also *State v. Batchelder*, 4 Minn. 223; 80 Am. Dec. 410, and note.

GUNN v. OHIO RIVER RAILROAD COMPANY.

[36 WEST VIRGINIA, 165.]

NEGLIGENCE IS the failure to discharge the duty of taking ordinary care, to the injury of one to whom the duty is due, such failure being the direct proximate cause of the injury to him.

ORDINARY CARE IS such as a prudent man of the requisite skill will take under the circumstances of the particular case.

RAILWAY CORPORATIONS — DUTY OF TO CHILDREN UPON TRACK. — A railroad corporation owes, with respect to children of tender years and immature judgment, at least the duty which it owes to domestic animals straying upon its track, to wit, the duty of keeping a reasonable lookout to discover whether they are on the track, as well as to avoid injury to them after they are seen.

RAILWAY CORPORATIONS — CHILDREN ON TRACK, WHETHER MAY BE TREATED AS TRESPASSERS. — A child of such tender years that he is conclusively presumed to be incapable of committing a crime cannot, if he strays or sits upon a railway track, be regarded as a trespasser to whom no duty is due and for whom no lookout need be kept.

EVIDENCE — RES GESTÆ — QUESTION WHICH MAY CALL FOR. — If a witness who was present when children were run over by a railway train is asked, "Right at the time and while you were examining the children, — right at the time of the accident, — what, if anything, did you hear the conductor or engineer say?" the form of the question is such as to indicate that the answer may relate to the *res gestæ*, and therefore be admissible, and the trial court should not presume that the answer will be incompetent, and on that account refuse to hear it.

JURY TRIAL — VIEW OF THE PREMISES. — Under a statute declaring that the jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision, the trial court is vested with such a discretion that its action in granting or denying a motion to have the jury view the place where the accident occurred will rarely be reviewed by the appellate court.

RAILROAD CORPORATIONS — ORDINARY CARE — QUESTION FOR JURY. — Whether the servants of a railway corporation in charge of a train which ran over children of tender years, playing or sitting on the track, exercised ordinary care in keeping the requisite outlook to discover such children, or when discovered used such measures as were proper, under the circumstances, to avoid injuring them, is a question which can rarely, if ever, be determined as a matter of law, and should therefore be submitted to the jury.

JURY TRIAL — COMMON KNOWLEDGE AND COMMON EXPERIENCE are parts of the trial of every civil issue without special proof, and the jurors are authorised to draw inferences from such knowledge and experience.

RAILWAY CORPORATIONS — KILLING CHILDREN — CASE FOR THE JURY. — If children of tender years are run over and killed by a railway train while sitting on or near the track, and the evidence tends to prove that they could have been seen in time to avoid injuring them had a reasonable outlook been kept; that the firemen had been putting coal on the fire, and did not see them until too late to stop the train before reaching

them; and there was no evidence as to whether the engineer was keeping an outlook or not, and a conflict of evidence as to whether danger signals were sounded or not when the children were seen, a proper case is made for submission to the jury, and it is error for a court to direct a nonsuit.

Gunn and Gibbons, J. E. Beller, C. E. Hogg, and W. E. Beller, for the plaintiff in error.

B. V. Archer, for the appellee.

HOLT, J. On the twenty-sixth day of June, 1890, in the morning between eight and nine o'clock, in Mason County, three miles below Point Pleasant, on the track of the Ohio River Railroad Company, two little boys, the one named Henry C. Mays, the other named Lucla Mays, were accidentally killed by the up-bound passenger train on defendant's railroad. I say "accidentally" in the beginning, once for all; for to suppose that fireman, engineer, or any one in conduct of the train did so knowingly or willfully, in the sense of purposely, is, according to the evidence, absurd and entirely out of the case. It was an accident, nothing more.

Of those two little brothers, Henry, the only one whose death is before the court in this case, was between four and five years old. Lucla was slightly larger, and presumptively a year or more older, but his age does not otherwise appear, nor is his death a matter of concern in this case, except so far as the evidence connects the two, and the killing of the one throws light upon the circumstances attending the killing of the other.

This suit was brought in August, 1890, in the circuit court of Mason County, by W. R. Gunn, administrator of the child, Henry C. Mays, deceased, against the Ohio River Railroad Company, for ten thousand dollars damages for the alleged negligence of the defendant in causing the death of the child Henry. The case was matured for hearing. Defendant appeared and pleaded not guilty. A jury was impaneled but, failing to agree, were discharged from rendering a verdict.

On the 11th of May, 1891, the case was again put on trial, and, after plaintiff had introduced all his evidence, on motion of defendant the same was excluded; and the jury, without being permitted to consider any evidence on plaintiff's behalf—none was offered by defendant—rendered a verdict of not guilty. The plaintiff moved for a new trial. The court refused it. Plaintiff excepted. The court rendered judg-

ment, and the record is now here for review on writ of error allowed plaintiff.

Eleven witnesses were examined by plaintiff. All were near, one of them a passenger on the train, but no one knew anything about the immediate circumstances or cause of the killing, except the fireman on the train, who saw it all, but too late, as it turned out, to prevent it. I here give his testimony, as certified and sent up by the court below:—

“Was fireman on the train by which the accident occurred. Saw the children at the time they were hit. Think it was the cylinder struck them. When they were struck they rolled off down into the little culvert or ditch.”

Upon cross-examination the witness testified as follows: “As soon as witness saw the children the bell was rung and the whistle sounded—the alarm given by witness. To avoid the accident, the air was put on and the engine reversed, and witness did everything he could to stop the train, and everything was done that could be done.”

Upon redirect examination said witness further testified: That witness saw some object on the track; that he did not know what it was. When he was about fifty or seventy yards below where the children were struck, witness had just been putting coal in the fire, and had gone up on his seat-box. Could have seen an object on the road there some three or four or five hundred yards. Could not discern what the object was that far if as small as decedent. As soon as witness discovered the danger the air was put on and the engine reversed. Witness did not leave anything undone that could be done to avoid the accident, and could not have prevented it after he saw the children. Witness had been shoveling coal, and had just got upon his seat when he saw the children. It was a clear day. Witness did not know whether the engineer in charge of the train was on the lookout or not. He was sitting there. It was his business to look out. It is the duty of the engineer or fireman to look ahead. It is the duty of the fireman to look on one side and the engineer on the other. The children were sitting on the witness's side of the engine. They were sitting right astraddle of the guard-rail. Think cylinder struck larger boy, and the step on witness's side of engine struck smaller boy. They were sitting on left side, facing north. Witness supposed train was running twenty-five or thirty miles an hour, and it would take something like a hundred yards or over to stop. Train ran

about the length of itself past the children before it was stopped, and suppose it was something like a hundred yards after witness saw children until train was stopped."

The accident took place on a short trestle ten or twelve feet long and four and a half feet high above the bottom of the ditch or small stream which it spanned. It supported about ten cross-ties, eight inches broad, eight and a half feet long, with a space of about six inches between the ties. At the trestle there was a cattle-guard, a fence enclosing the railroad from there going up, but no such fence going down. A public road here ran along the railroad some fifty feet away to the right, going up and going down, to a public crossing four hundred yards below the trestle.

Four hundred yards below the crossing the up bound train, having turned a curve, had a straight, level stretch, without cuts, with the view wholly unobstructed from there to the trestle. The morning was bright and clear, and the two little boys, if then upon the trestle, could have been seen, and might have been seen by those whose duty it was, if it was the duty of any one, to keep a lookout up the track, for a distance of six hundred yards — say two hundred yards — below the public crossing; and at that distance they could not only be seen as persons on the track, but could be recognized as two small children, according to the testimony of two of the witnesses.

The father and mother lived four hundred yards east of the trestle, and kept one cow, which ran at large, and they were in the habit of sending these two children to drive the cow to the public road at the trestle, and turn her up the road at that point, with directions not to go on the railroad, but to come back home; and they were thus sent by their mother to drive the cow to the road on the morning in question, with instructions to come back at once.

They had once before been seen herding the cow near the trestle, and at one time playing on the abutment of the trestle, and the mother had been cautioned on that morning, and before, to keep these two little boys away from the railroad.

The passenger train, engine, tender, and two coaches, about one hundred and fifty feet long, was running at the speed of twenty-five or thirty miles an hour, twelve to fourteen yards a second, and it could not be stopped in less than one hundred yards.

The evidence of the fireman, as certified, leaves it in some doubt whether or not he saw the children as objects on the track before he saw and recognized them as children. Just before he saw them close at hand he had been shoveling coal. How far back he commenced or how long he was at it, he does not tell us; but he does tell us that at a distance of fifty or seventy yards, having just gotten upon his seat, he saw the children. Then, as he says, the bell was rung, the whistle sounded, the air was put on the brakes, the engine reversed, and everything done that could be done in that way to save the children. A passenger on the train, and two other witnesses near by, heard no danger signal sounded.

At what time the children got upon the trestle and took their seats astride the guard-rail, nineteen or twenty inches from the iron rail, measured from the outside of guard-rail, which was eight inches broad, does not directly appear from any testimony. It is a matter of presumption and inference only, a very important one, too, and especially one for the jury to determine; but this much I think can be said with safety: They were on the track, standing, going, or sitting, when the coming train was at least 150 yards below the point where the fireman recognized their danger as children.

The engineer was not examined as a witness, but he was at the time at his post, where he could see, if on the lookout, and could, by all the opinion-evidence, have recognized them as children.

The train ran about the length of itself past the children before it was or could be thus stopped. They were struck, the fireman thinks, by the cylinder, knocked senseless into the ditch, and both died that day in a few hours.

Among the multitude of cases on the difficult and complex subject of negligence, uniformity need not be looked for and cannot be expected. The general subject of negligence may be and has been discussed from various standpoints, but the following general doctrine, taken in the main from our own cases and inferences fairly to be drawn from them, will answer my present purpose:—

“Negligence,” in cases like this, may be descriptively defined as a failure to discharge the duty of taking ordinary care, to the injury of one to whom the duty is due, such failure being the direct, proximate cause of the injury. Ordinary care is such care as a prudent man, of the requisite skill, will take under the circumstances of the particular case.

In the practical application of the doctrine and principles of the law of negligence to the affairs of the present time, the old method of classification is sometimes found to be inconvenient, because we need a measure with more than three marks on it, an instrument of more gradations and capable of more accurate adjustment to the facts of each particular case; hence the present tendency in a large class of cases is to take ordinary care as a quantity, variable as the occasion may require, to measure the duty, sliding it up or down, so as to adjust it as near as may be to the reasonable requirements of the particular case; so that, instead of using the measure with three marks on it made beforehand, we go on to the ground to make a special measure for the occasion, by surrounding a prudent man, of the requisite skill, with the facts of the case, and determining what he ought to do in the circumstances; that is the measure of ordinary care. The ordinary care measures the duty, and the violation of the duty is the negligence complained of.

The old classification is still useful in many ways, for not only in the nature of things are there different degrees of negligence, but, what is not less important, we cannot rid ourselves of the tendency to consider and speak of it in that way, as we do of the gradations of crime. This method is a mere convenience, obtained by starting at a different point in this circle of correlations, and taking ordinary care as the variable yard-stick, if we may so call it, to measure the duty, and to be made *pro hac vice* by putting the prudent man of the requisite skill in the place of the supposed transgressor, and calling upon the jury to tell us what we would have a right to expect him to do. The use of this measure, which has to be made on the spot and for the occasion by men of prudence and common sense, is one reason why the jury is generally permitted to aid in the making of it.

The jury, or some of them, are generally men of common sense and common prudence, of skill and experience in some one or more of the affairs of life requiring skill, and in theory they are supposed to be present for the purpose of finding facts, and among them the variable facts which go to make up ordinary care. Neither is it to be forgotten, and the occasions for bearing it in mind are frequent, that the judge who may preside is a man of common sense, has knowledge and experience in the affairs of men, with special knowledge of the rules of law, with experience and trained aptitude in ap-

plying them. He supervises and aids the finding of the verdict, generally directing it conditionally, based upon belief of the jury in a certain statement of the facts which there is evidence tending to prove; but sometimes, where the case is so plain that there are no two sides to it, directing unconditionally such finding.

One question presented by this record is, did the railway company owe the duty of reasonable outlook to this young child, from age, size, appearance, and conduct presumably insensible of its danger or helpless to avoid it? The right of a railway company to a clear track, where others have no right to be, is a right to them of an imperious nature, fortified by the urgency of grave public requirements; and in some places, England, for example, trespassing upon a railway company's track is forbidden by statute.

It has been held in this state in several cases that the railroad company owes to the owner of domestic animals the duty of reasonable outlook for such animals straying upon its track. In such cases the company is bound to adopt the ordinary precaution to discover that the cattle are on the track, as well as to avoid injuring them after after they are seen: *Baylor v. Baltimore etc. R. R Co.*, 9 W. Va. 271; *Washington v. Baltimore etc. R. R. Co.*, 17 W. Va. 190, and other cases.

In the case of *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78, the same general doctrine was laid down, and has been regarded by some as defining the true rule of duty and obligation resting upon railway companies, as well to persons lying upon their track and to young children as to animals: 2 Wood's Railway Law, sec. 320, p. 1267. The writer goes on to say: "The rule may be said to be that a railway company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury to them."

The case in hand does not require that we should go that far, but the duty of reasonable outlook due the owner of domestic animals is well settled, is binding authority for us, as well as a rule of conduct for the railway company. If that is to stand, how can we avoid applying it to a boy four years old on the track, insensible of his danger, and helpless to escape? Being a child, he acted like a child, failing to exercise any care for his own safety; "he is not to be judged

as a man, considering his age and the circumstances of the case." We see nothing that would justify the imputation of contributory negligence.

Was he a "trespasser"? How could he be, within the meaning of the term, as one to whom no duty was due? He is conclusively presumed to be incapable of crime, of crime in the true sense. But it is said we must impute to the child the negligence of the mother; set off her negligence against the life of the child; offset the accident to the child with the negligence of the mother, for her negligence in sending him there with the cow was the occasion of the accident, and her husband, the father of the child, is the beneficiary here. However this, together with the need of rapid transit, may do elsewhere, it is excluded here by reason of the cases already mentioned.

But it is said that there is no analogy to the rule in the cattle cases, because the company is not required to fence. The owner is not required to keep them up, but may let them run at large. Therefore they may be expected—looked for—on the track now and then, and so must be looked out for. This is a mere play on the root-meaning of the word "expect." Are not children suffered to go at large more or less, and is not their occasional presence upon the track to be reasonably anticipated? Therefore, why not "expect" them also, taking the word in its primary sense.

I have authority for saying—the case from 27 Conn., cited above, is one—that such is not the reason of the rule requiring outlook, as settled in the "cattle" cases. It rests upon a broader principle, and, like all broad principles, its boundaries are not defined, and cannot be; but enough has been mapped out to cover this case.

"We must so use or protect our own rights as not to use excessive force or otherwise unnecessarily injure or destroy those of another," as defined by Judge Ellsworth.

Again, we may not push our own rights to an extreme to the harsh or unnecessary injury of another; for such extreme rights are no rights, as may be illustrated by the case of shooting a petty thief on your grounds in the daytime.

Again, that some one shall always be on the lookout on a running train is from its nature, and as shown by experience, one of the most important safeguards; indispensable, in fact, for the passenger on the going train as well as the passenger on the coming train, for those off as well as those on the

train. The enforcement of such outlook is so imperative, on the ground of public policy, that the law may impose it as a duty, due to one who may himself be in the wrong.

The passenger, for example, may not be hurt; therefore he cannot sue—he must wait until he is hurt; but he much prefers safety in fact, and the sense of safety, to any right of action after the injury has been sustained. In this matter the prevention is much more important than the cure. This makes the duty of outlook reasonable where otherwise it might not be so; and the same duty due to others makes its performance easy. So that reasonable outlook may be exacted as a specific duty in some cases such as this, when it may not be able to stand the test of legal reasoning on strict principles relating to ordinary things.

The rule of outlook laid down in the cattle cases is not without the foundation of some such principles. They cannot now be overthrown, and from them there is otherwise no escape, reinforced, as it is in this case, by the law's tenderness to human life and limb.

The practical application of this doctrine to the case of children leads, as I now see it, almost inevitably to its application to adults, which would bring us into antagonism with very many cases of very high authority; but, when we have it to decide, this seeming inevitability may end in a plain way found, if not in an extension of the rule.

But the question of taking the case from the jury remains. Cases often occur the decision of which may properly be withdrawn from the jury. Some courts have and exercise the power of directing a nonsuit; but in *Ross v. Gill*, 1 Wash. (Va.) 89, decided in 1792, it was held that the courts of this state "have no power to direct a nonsuit, however destitute the plaintiff may be of a right to recover." They may advise it, and direct the plaintiff to be called; but if he refuses to suffer a nonsuit, the courts can protect and enforce their opinion only by awarding a new trial, in case the jury find against their direction; but they may expressly direct the jury to find for the defendant, which, in practice, is seldom disregarded.

Upon a motion for a nonsuit, the court may give their opinion that the plaintiff has no cause of action, and may direct him to be called, but he may nevertheless appear and refuse to be nonsuited: *Thweat v. Finch*, 1 Wash. (Va.) 217.

So, on the other hand, the court may, upon motion, declare that the action is maintainable, or may refuse to give any

opinion, and so leave the whole question with the jury: *Thweat v. Finch*, 1 Wash. (Va.) 217; and this latter is the proper course, unless some essential element of the right of recovery is wholly wanting, or the evidence, as a whole, is so destitute of proof of what is essential that there is no room for two honest, intelligent opinions about it, or the question, on indisputable facts, is purely a question of law. So the court may direct the jury to find the facts on any issue in a special verdict, and then decide the case on the law arising thereon; or to find in writing on any particular question of fact stated in writing: See code 1891, c. 131, sec. 5.

But each party has, as matter of right, the power to withdraw the case from the jury and have it decided by the court, in which case all the evidence is certified and considered, and the jury find a verdict for the plaintiff, together with the amount he is entitled to recover, if the opinion of the court upon the demurrer to evidence shall be for the plaintiff, and a verdict for defendant, if such opinion shall be for defendant; and all reasonable and proper inferences are left to be drawn by the court, without the necessity of their being found or agreed on, and when decided, the case is ended.

If the method of moving to exclude for insufficiency is resorted to, it must, at least, be confined to such cases as justify the court in directing a verdict. We have no right to presume that the plaintiff brings his suit in order to have certain points of law determined by one or more appeals.

He desires a trial by jury if he is entitled to it, and, in any event, may rest satisfied with their verdict. If incompetent evidence is in, let it be stricken out; and if that leaves plaintiff's case without support, or if from any cause he is clearly not entitled to a verdict, let the court direct a nonsuit. How do we know that plaintiff will not submit to it? And if plaintiff does not submit, let the jury be directed to find for defendant. If the defendant thinks it a proper case to withdraw from the jury, and submit to the court for decision upon the immediate or more deliberate consideration of all the evidence, he can thus withdraw it; such is his right.

During the progress of the trial plaintiff in error asked Mrs. Esom Mays, the mother of the two little boys, the question: "What was the age of your youngest child that was at home at that time?" (time of the accident.) She was not permitted to answer, and plaintiff having excepted assigns this ruling as error. This question of plaintiff to his own witness

was intended, no doubt, as a gradual approach; but he begins so far off that we are not able to see any relevancy whatever, and the asking of it was properly refused.

James Capehart, a witness for plaintiff, was a passenger on the up-bound train that morning, and was asked by plaintiff the question, "Right at the time and while you were examining the children — right at the time of the accident — what, if anything, did you hear the conductor or engineer say?" The court refused this question. It was proper for plaintiff to indicate by the form of the question, or when objection was made in some other proper way, that he was seeking to elicit a part of the *res gestæ*. I think the question itself pointed with sufficient certainty to the supposed nature and competency of the expected reply; and the court should, in some way, have heard the answer of the witness, and then have determined whether the thing said was a part of the thing done, or only a mere narrative of something that had taken place. As it is, this court can not say whether the expected answer was competent or not, and the record shows that the competency of the answer was determined without hearing it.

Under sec. 30, c. 116, p. 780, of the Code of 1891, and before any evidence had been heard, plaintiff moved the court to send the jury to view the place where the accident happened, and again after the plaintiff's evidence was all in he renewed his motion. The court overruled the motion. This proceeding must, for obvious and peculiar reasons, be left largely to the discretion of the trial court, who can best say whether such view is necessary to a just decision. So far as the record enables this court to venture an opinion on the point, it appears that such view was not necessary; and besides, the court may have based its refusal on other proper grounds, which readily suggest themselves: *Baltimore etc. R. R. Co. v. Polly*, 14 Gratt. 470, 471.

In conclusion, summing up our views of this case, we are of opinion, from principles already announced by this court, that a railway company owes to a child on its track, apparently insensible of its danger, the duty of ordinary care in keeping before its running train an outlook, reasonable according to the circumstances, in order to discover the child, and, when discovered to be such a child, to use such precautionary measures as are proper and prudent, in the circumstances, to avoid its injury.

In such cases the measure of duty is ordinary care. Such

care is not fixed, but variable, depending upon the reasonable requirements to be exacted from the prudent man of skill in the business, in the circumstances. So that the question, what is the duty in the circumstances of the case, as well as the question whether or not such duty has been performed, has to be determined in some way, but, from its variable nature, can not be determined as a matter of law; hence the peculiar propriety of not withdrawing it from the jury, except by the long-settled and well-established methods: See *Westchester etc. R. R. Co. v. McElwee*, 67 Pa. St. 311; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30.

As to the question propounded to Mr. Capehart, his own evidence shows that he was a passenger on the train, who at once got off and went to the place of the accident with the engineer and conductor. The form of the question, and the circumstances under which it was propounded, sufficiently show that plaintiff proposed to prove something said as part of the *res gestæ*, and the court should have heard or seen the answer, and then have passed upon its competency: See *Scotland Co. v. Hill*, 112 U. S. 183; see book 12, Lawy. Rep. Ann. p. 556, notes to *Shinners v. Proprietors, etc.*, 154 Mass. 163; 26 Am. St. Rep. 226.

As to the time when the deceased took his seat astride the guard-rail, common knowledge and common experience are parts of the trial of every civil issue, without special proof; so that the jury might reasonably infer from the facts proved that it would require a few seconds, at least, for these children to go upon the trestle and seat themselves. As to the exclusion of the evidence in this case, we think it was error to exclude the same from the jury; but we do not thereby intend to intimate any opinion as to what should have been done, if the question had arisen upon a demurrer to evidence or on motion for a new trial after verdict.

Reversed. Remanded. —

NEGLIGENCE — WHAT IS. — Negligence is a want of ordinary care: *Montgomery v. Muskegon Booming Co.*, 88 Mich. 633; 26 Am. St. Rep. 303, and note. Negligence is the failure to observe that degree of care and caution which the circumstances demand in order to save another person from harm: *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186, and note.

NEGLIGENCE — ORDINARY CARE — WHAT IS. — Ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances: *Winters v. Kansas City etc. R'y Co.*, 99 Mo.

509; 17 Am. St. Rep. 591; *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note; *Spokane Truck etc. Co. v. Hofer*, 2 Wash. 45; 26 Am. St. Rep. 842, and note; *Hayes v. Gainesville etc. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Houston etc. R'y Co. v. Boozer*, 70 Tex. 530; 8 Am. St. Rep. 615.

RAILROADS. — DUTY TOWARDS CHILDREN TRESPASSING ON TRACK: See *Rosenkranz v. Lindell etc. R'y Co.*, 108 Mo. 9; *ante*, 538, and note; *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591, and note. See also extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209; 30 Am. St. Rep. 50, and note.

TRIAL — VIEW OF PREMISES BY JURY. — It is in the discretion of the trial judge to allow or refuse a view of the premises by the jury: *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936; *Saint v. Guerrerio*, 17 Col. 448; 31 Am. St. Rep. 320. See extended note to *Erwin v. Bulla*, 92 Am. Dec. 342.

SEAMONDS v. HODGE.

[36 WEST VIRGINIA, 304.]

TRUSTS PRECATORY. — If property is given for the absolute benefit of, or to be at the disposal of the donee, especially if such donee be a parent, no trust will be created by subsequent words showing that the maintenance of children was the motive of the gift.

A TRUST IS NOT CREATED BY A MERE USE OF WORDS INDICATING THE MOTIVE of gift, as where its purpose is expressed as being to enable the donee to maintain his children, or pay his debts, or the like.

WILLS — DEVISE WHEN NOT IN TRUST. — A will declaring that the testator gives to his wife all his estate, both real and personal, for the purpose of raising his children, to hold to her and her heirs forever, vests her with an absolute estate and does not create any trust in favor of her children.

W. S. Thornburg and Brown, Jackson and Knight, for the appellants.

Simms and Enslow, for the appellees.

ENGLISH, J. Matthew Lusher, who was a resident of Cabell County, West Virginia, made his last will and testament on the first day of March, 1854, and died during the same month. In this will, after providing for the payment of his debts and funeral expenses out of his estate, he inserted the following clause: "I give and bequeath to my wife, Margaret Lusher, all my estate, both real and personal, of every kind and description, for the purpose of raising her children, to have and to hold for her and her heirs forever." Said Matthew Lusher left surviving him his widow, Margaret Lusher, and five children, namely, Sarah J. Seamonds, wife of William H. Sea-

monds, James M. Lusher, Mary L. Gibson, Toliver S. Lusher, and Matthew I. Lusher. Said Margaret afterwards intermarried with one Hodge, by whom she had one child named Charles A. Hodge. Said Margaret Hodge died in 1888, the said Hodge, her husband, having died previously.

Shortly before her death said Margaret Hodge conveyed to said Charles A. Hodge a certain tract of land situated in Cabell County containing one hundred and twenty-five acres, the same being part of the land devised to her by said Matthew Lusher, which land was conveyed to said Charles A. Hodge in consideration of one dollar, subject to the life estate of the said Margaret, and for the further consideration that the said Charles A. Hodge should, at the death of the said Margaret Hodge, pay to Sarah J. Seamonds, James M. Lusher, Matthew I. Lusher, and Toliver S. Lusher each the sum of one hundred dollars without interest, and to Mary L. Gibson, at the death of said Margaret Hodge, one hundred and fifty dollars; and said C. A. Hodge was to have five years after the death of said Margaret Hodge in which to pay said several sums of money.

On the twenty-fifth day of April, 1890, the children of said Margaret Hodge by her first husband brought a suit in equity against said Charles A. Hodge, alleging that said Matthew Lusher died seised of valuable real estate in said county of Cabell, which he disposed of by his last will and testament, which was duly probated and admitted to record in the county court of said county on the twenty-seventh day of March, 1854, a certified copy of which will they exhibited; and they alleged that by the terms of said will the said Margaret Lusher did not take the legal title in fee, but only an equitable estate therein for her life, with an equitable estate in fee in remainder to the plaintiffs, the five children of the said Matthew and Margaret Lusher; that the said Margaret Lusher afterwards married said Hodge, who has since died, by whom she had one child, the defendant, Charles A. Hodge, and that the said Margaret died in 1888; that shortly before her death she conveyed said one hundred and twenty-five acres voluntarily and without consideration to said Charles A. Hodge, which was part of the lands disposed of by said will of Matthew Lusher, and in which said Margaret had an equitable estate for life, a certified copy of which deed was exhibited; and they further alleged that the said Margaret being dead, the said Charles A. Hodge holds the legal title to said land in trust for plaintiffs,

but that said defendant repudiates his character as such trustee, and claims to hold said land in fee for his own use and benefit, and denies that plaintiffs have any interest therein, all of which was alleged to be in fraud of the plaintiffs' rights, and to their great injury; and they prayed that said defendant might be decreed to hold the said land in trust for them, and that he might be directed to convey the same to them, and for general relief.

On the eighth day of February, 1890, the defendant filed a demurrer to the plaintiffs' bill; which demurrer being argued by counsel and considered by the court, on the twenty-third day of September, 1891, a decree was rendered in the cause, in which the court held that the will of Matthew Lusher, exhibited with said bill, vested an absolute estate in the devisee, Margaret Lusher, and that the plaintiffs were not entitled to the relief prayed for, sustained the defendant's demurrer, and dismissed the plaintiffs' bill, and from this decree the plaintiffs applied for and obtained this appeal.

The errors assigned are as follows: 1. The circuit court of said county erred in sustaining the demurrer of said defendant; 2. The court erred in decreeing that the will of Matthew Lusher vested an absolute estate in the devisee, Margaret Lusher. As these assignments raise the same question, they may be considered together.

I read the clause under consideration as follows: "I give and bequeath to my wife, Margaret Lusher, all my estate, both real and personal, of every kind and description, to have and to hold to her and her heirs forever, for the purpose of raising her children." It is contended by counsel for the appellants that the language of this clause made the said Margaret Lusher a trustee, holding the title of said property, as such, for the benefit of her children.

If the words "for the purpose of raising her children" be omitted from the clause, no one would question for a moment that the remaining words of the clause would confer upon said Margaret Lusher the fee-simple of said property. What is the effect, then, of the words "for the purpose of raising her children"? Do they create a trust, or must they not rather be construed as a motive of the gift?

In 1 Jarman on Wills, 700, we find the author says: "But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute benefit or to be at the disposal of the donee, especially if such donee be the parent,

no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift"; and also on page 701 he says: "In *Brown v. Casamajor*, 4 Ves. 498, a legacy was given to a father, the better to enable him to provide for his younger children. The father consented to secure the principal for the benefit of his younger children; but the court, on his petition, held him entitled to the past arrears of interest. The report suggests no reason for this decision but that which appears to be the reasonable one, viz., that the legacy was originally absolute to the father, and remained so, except so far as his consent to settle it had deprived himself of his interest": citing 4 Ves. 498; and again, on page 702, the author says: "A legacy to A, the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A could enforce in this court; and again a legacy to A, the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction."

Perry on Trusts, sec. 119, reads as follows: "But no trust is implied where the words simply state the motive leading to the gift, as where the gift is to a person to enable him to maintain his children, or an absolute gift is made, and the motive stated 'that he may support himself and children,' or a gift is made absolutely for her own use and benefit, 'having full confidence in her sufficient and judicious provision for the children'; . . . and it may be added that the mere expression of a purpose for which a gift is made does not render the purpose obligatory."

Again, in the case of *Rhett v. Mason's Ex'r*, 18 Gratt. 541, the clause in the will in controversy read as follows: "I devise all my estate in possession, remainder, reversion, or in expectancy to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life and widowhood. In the event of her marriage, she is to be restricted to her dower and distributary share, as in case of intestacy." It was held, upon the language of the clause, that the widow was entitled, during her widowhood, to the whole profits of the estate, and there was no trust for the children.

In the case of *Bain v. Buff's Adm'r*, 76 Va. 371, it was held that the words "for the sole and separate use of herself and

child or children," etc., do not give any estate to the child or children, but indicate the motive for the gift to the "mother."

Schouler on Wills, sec. 596, says: "American cases hold, moreover, that a gift to enable a legatee to confer a bounty on others is not a trust, but a beneficial legacy to him."

In *Wilmoth v. Wilmoth*, 34 W. Va. 426, this court held: "The second clause of the will giving a wife all of the testator's personalty, to be hers absolutely, to be used by her in any way or manner she may wish for her own comfort and for the benefit of our two children," gives the wife an absolute estate, and that "there was no implied or precatory trust thereby created for the children."

It will be noticed that the will under consideration was executed on the first day of March, 1854, and was admitted to probate on the 27th of the same month; and that the deed from Margaret Hodge to Charles A. Hodge was acknowledged on the eighth day of April, 1889, and was admitted to record on the twenty-fifth day of June in the same year; and this suit was instituted on the twenty-fifth day of April, 1890; so that the youngest child by the first marriage must have been thirty-five or thirty-six years of age at the time said deed was made and said suit was brought; and the strictest requirement of the clause we are asked to construe had long since been complied with, as the youngest child by the first marriage had reached its majority more than fourteen years before suit was brought. The property was given to said Margaret Lusher, to have and to hold to her and her heirs forever for the purpose of raising her children. This wish of the testator had long been complied with, and it is clear that said children could claim nothing further under the will. No trust was created in their favor.

We are therefore of the opinion that said clause in the will of Matthew Lusher conferred on his devisee, Margaret Lusher, an absolute estate in the property devised, and that the circuit court committed no error in sustaining the defendant's demurrer.

The decree complained of must therefore be affirmed, with costs and damages to the appellee.

TRUSTS — PRECATORY — DO NOT ARISE WHEN. — Ordinarily no trust will arise where a devise is made to one standing in the relation of a parent touching the maintenance of children, as such directions generally relate to the motive only of the testator: *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54. See note to *McIntyre v. McIntyre*, 10 Am. St. Rep. 532. No trust

will be implied merely from words indicating the motives inducing the gift: *Randall v. Randall*, 135 Ill. 398; 25 Am. St. Rep. 373, and note. Mere words of desire, recommendation, and confidence in a will do not create a trust: *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718, and note; *Good v. Fichthorn*, 144 Pa. St. 287; 27 Am. St. Rep. 630. For a discussion of precatory trusts and their creation see extended notes to *Harrison v. Harrison*, 44 Am. Dec. 372, and *Knox v. Knox*, 48 Am. Rep. 494.

WOOLWINE'S ADMINISTRATOR v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

[36 WEST VIRGINIA, 329.]

NEGLIGENCE.—TRESPASSERS AND LICENSEES GOING UPON THE PREMISES OF ANOTHER take them as they find them, and run such risks as are incident to the existing condition of the premises, and therefore cannot complain of their needing repairs, nor recover for injuries received from the condition in which they find the premises, but may recover for injuries resulting from the subsequent negligence of the owner while they are on the premises.

NEGLIGENCE, WHO MAY COMPLAIN OF.—A plaintiff, seeking to recover for injuries received by him from the negligence of another, must show that the latter committed a breach of some duty owing to the plaintiff or imposed for his benefit.

LICENSEES, DUTY TO.—ONE WHO GOES INTO A TELEGRAPH OFFICE FOR THE purpose of paying a social visit to the operator there, who is an old acquaintance, is not a person to whom the corporation owning and maintaining the office owes any special duty, and therefore he cannot recover for injuries sustained from the dangerous condition of the premises arising from the previous negligence of one of the owner's employees.

A LICENSEE UPON THE PREMISES OF A RAILWAY CORPORATION IS ONE WHO, being neither a passenger, servant, nor trespasser, nor standing in any contractual relations to the corporation, is permitted by it to come upon the premises for his own interest, convenience, or gratification.

JURY TRIAL—VERDICT WHEN MAY BE DIRECTED BY THE COURT.—When the evidence given at a trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

TO A MERE LICENSEE ON THE PREMISES OF ANOTHER THE LATTER OWES NO DUTY other than that of not willfully nor wantonly injuring him. The license must be accepted subject to the risks and perils attendant thereon.

Adams and Miller for the plaintiff in error.

J. E. Chilton, for the defendant in error.

ENGLISH, J. This was an action of trespass on the case, instituted on the thirteenth day of March, 1890, by M. A. Manning, administrator of the estate of A. D. Woolwine, de-

ceased, in the circuit court of Summers County, against the Chesapeake and Ohio Railway Company, charging that the death of his intestate was occasioned by the gross carelessness and negligence of the defendant, and claiming ten thousand dollars damages. There was a demurrer interposed to the declaration, which was overruled; the defendant pleaded "not guilty," and the case was submitted to a jury. The plaintiff, having introduced his evidence, rested his case, and the defendant moved the court to strike out all of the plaintiff's evidence, which motion was sustained, and the plaintiff's evidence was stricken out, to which action of the court the plaintiff excepted, and thereupon the jury rendered a verdict for the defendant. The plaintiff then moved the court to set aside said verdict, which motion the court overruled, and the plaintiff excepted, and tendered a bill of exceptions, setting out all of the evidence of the plaintiff, and the plaintiff applied for and obtained this writ of error.

The facts shown by the evidence are, in substance, as follows: At the east end of the Big Bend tunnel, in said county of Summers, and about eighty yards from the eastern portal of said tunnel, the defendant had constructed a switch, which diverged from the main track of the defendant to the right, passing along near the bank of the Greenbrier River; and that immediately on the bank of said river, and between said switch and the river, the defendant had erected a small building, fourteen by sixteen feet in size, for its own convenience as a telegraph office, the front part of which building rested on the bank, and the back rested on perches. Those living in the immediate vicinity of this telegraph office were tunnel hands, and were employees of the defendant.

The plaintiff's intestate was a telegraph operator on the Norfolk and Western Railroad, and was at home on a visit to his parents, who lived about two miles from the tunnel; and on the evening of the sixth day of February, 1890, he paid a visit to this office, being an acquaintance of Bryant, the operator. At the time of this visit, the train which was used for working in the tunnel was standing in front of the telegraph office, on the side track, which was seven feet from the front of said office, and had been so standing for one hour and fifteen minutes, and it appears that Joe Towns, one of the employees, whose duty it was to close the switch after the tunnel train came in on the side track, had failed to do so, and a freight train, coming east through the tunnel, ran into this open

switch on to the side track, and wrecked the tunnel train, throwing some of its cars against said office, knocking it over the river bank into the river, thereby causing the death of the plaintiff's intestate, who had entered said telegraph office about twenty-five minutes before, and at the time of the accident was lying on a table in the said office.

It appears that the plaintiff's intestate had, about a year previous to that time, been employed by said Bryant, and worked a week in his place as operator in said office; and the natural inference is that he called on this occasion, as is natural for persons engaged in the same business, to pay Bryant a friendly visit. So far as is disclosed by the evidence, he had no business to transact of any character with the office, although it appears that messages had occasionally been sent and received from this office by parties having no connection with the railroad, but that the office was maintained by the defendant for its own convenience, as is shown by the plaintiff's testimony.

No one could presume from anything that appears in the case that any employee of the defendant left this switch open with the intent of injuring the plaintiff's intestate, A. D. Woolwine. On the contrary, it appears that said Woolwine did not come to said telegraph office for more than an hour after the tunnel train ran in on the side track, and said switch was accidentally left open by Joe Town, whose duty it was to close it after said tunnel train came on to the siding.

No one appears to have been aware of said Woolwine's intention to visit said telegraph office, and, if they had, it does not appear that any employee of the defendant had any ill-feeling or spite against said Woolwine; and we cannot say that any person so employed would intentionally wreck two trains and demolish the telegraph office for the purpose of injuring Woolwine. Moreover, no one could possibly have foreseen that the freight train, by leaving the main track and running out on this siding, would have thrown the tunnel cars against the telegraph office, which stood seven feet from the side track, and knocked it down the river bank and into the river. This, however, appears to have been one of the possibilities.

The evidence in the case shows that said Woolwine was fully acquainted with the telegraph office and its surroundings, as he had during the previous year been employed for a week as operator in said office by said Bryant.

Counsel for the plaintiff in error, in their brief, assert that: "The general principle is that trespassers and licensees going upon the premises of another take the premises as they find them, and run such risks as are incident to the existing condition of such premises, and therefore cannot complain of their needing repairs, and cannot recover for injuries resulting from the condition in which they find the premises; but the distinction is that they can recover for injuries resulting from the subsequent actual negligence of the defendant while the licensee is on the premises." This, we believe, states correctly the law where parties go upon the premises of another under the circumstances that Woolwine did in this case.

If we apply this law to the facts of this case, we find that the switch was open when he went to the telegraph office, and so remained for an hour and twenty minutes before the accident happened; and Woolwine had been in the office about twenty-five minutes when the collision occurred. There was no change in the switch after the arrival of said Woolwine, and he took upon himself the risk of the premises in the condition he found them.

We may next inquire whether the circumstances of this case are such as to entitle the plaintiff to complain of a breach of duty on the part of the defendant towards his intestate: 1 Shearman and Redfield on Negligence, sec. 316, under the head of "Who may complain of a breach of duty," says: "The plaintiff must show a breach of some duty owing to him, or which was imposed for his benefit." It is not every one who sustains an injury by reason of some act or omission on the part of an employee of a railroad company that entitles a person injured by reason thereof to demand and recover damages from said company by reason thereof: See Bishop's Non-Contract Law, sec. 446; *People v. Fairchild*, 67 N. Y. 336.

We find that 1 Shearman and Redfield on Negligence, sec. 97, says: "The injury which a stranger does to the railroad company by entering upon its way is infinitesimal, while the risk to himself is great. The injury which he does to his neighbor by secretly entering his bedroom is great, while the risk to himself, if undiscovered, is infinitesimal. In each case, it is true, the effect upon the trespasser's right to sue for damages may be the same, but this will be for very different reasons. If he walks along the track, he knowingly takes the risk of fatal injuries, and should not recover for that reason. If he secretes himself in the bedroom, he knowingly engages

in a gross invasion of his neighbor's rights, and should not recover for that reason. Most of the reported cases which appear at first sight inconsistent with this proposition, and all of them which are not inconsistent with other and better considered decisions, will prove upon examination to be cases which turned, not upon contributory negligence, but upon the question whether the defendant owed any duty to persons in plaintiff's situation, which he had neglected to perform."

Now let us inquire what duty the defendant owed to this unfortunate young man under the circumstances detailed by the evidence. He went upon the defendant's premises, and into its telegraph office, not for the purpose of sending a message, or transacting any business of any kind whatever with any of the agents or employees of the company, but for the purpose of paying a social visit to the operator, who was an old acquaintance. In the case of *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644, Bigelow, C. J., in delivering the opinion of the court said: —

"In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier, or falls into an excavation there situated. The owner of land is not bound to protect or provide safeguards for wrong-doers. So a licensee who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his pre-

ises in a suitable condition for those who come there solely for their own convenience or pleasure."

In the case of *Diebold v. Pennsylvania R. R. Co.*, 50 N. J. L. 478, it was held: "Where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty."

There appears to be a marked distinction as to the liability incurred by property owners to persons who go upon their premises as trespassers, or as licensees or volunteers, and those who go there upon business, and we find in a note on page 697 in *Leading Cases on the Law of Torts*, by Bigelow, it is said, in commenting upon this distinction, that "*Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; and *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 311, have settled the distinction between the duty which a man owes to persons who come upon his premises as bare volunteers or licensees, and those who come as customers or otherwise in the course of business, upon the invitation, express or implied, of the occupier. As to the latter, the occupier is bound to exercise reasonable care, to prevent damage from unusual danger, of which the occupier has or ought to have knowledge; and this, though the transaction had already been completed, and the plaintiff had returned only for some incidental (if proper and usual) purpose connected with it. As to the former, the party takes his own risk, and so long as there is no active misconduct towards him, no liability is incurred by the occupier of the premises by reason of injury sustained by a visitor on his premises." . . . "Upon careful examination of the above and other cases, however, it will be found that the authorities may be classed under three heads, to wit: 1. Bare licensees or volunteers; 2. Those who are expressly invited or induced by active conduct of the owner to go upon his premises; 3. Customers and others, who go there on business with the occupier. The general rule will then be, that in those cases which fall under the first head, the party injured has no right of action against the occupant of the premises, and the contrary in cases falling under the second and third heads."

The case of *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311, above referred to, was a case in which the defend-

ant was a sugar refiner, and there was a hole or hatchway through the floors of the different stories for the purpose of raising and lowering sugar to and from the different stories, which hatchway was level with the floors, and might have been, but was not, fenced. The plaintiff was a gas fitter, and went upon the premises for the purpose of examining some gas jets, with the view of applying a patent gas regulator, and while on the premises, the plaintiff accidentally fell through said hatchway while thus engaged upon an upper floor.

"Held that, inasmuch as the plaintiff was upon the premises on lawful business in the course of filling a contract in which he (or his employer) and the defendant both had an interest, said hatchway or hole was, from its nature, unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced."

The testimony of Bryant in the case under consideration shows that he had not seen said Woolwine for a month or two; that his business was that of a telegraph operator on the Norfolk and Western Railroad, and when asked what was said Woolwine's business there (meaning at the time of the accident) answered: "I do not know, I am sure. I suppose he just came in to speak to me"; and in answer to the question whether said Woolwine had any business there that night, answered: "He did not transact it, if he did"; and he also stated that he left said Woolwine lying on the table where his instruments were placed when he went out of the office, in reply to the question, "Where was Woolwine when the accident occurred?"

So far then as the presence of said Woolwine at the time of the accident is concerned, it appears that he was not invited there by Bryant, the operator in charge of the office, as he had not seen him for a month or two previous to that evening. He was not there on business, as he had been there for nearly a half hour, and had not intimated that he had any business of any description with the operator, and had produced the impression on Bryant that he had merely called to see him; and his attitude on the table at the time of the accident would not indicate that he was there on business, but rather for the purpose of passing a little idle time with an old acquaintance. If he had been there for the purpose of sending or receiving a telegram, he might properly have been

regarded as a licensee, as the evidence shows that telegrams were occasionally sent for persons not in any manner connected with the railroad company, and messages so sent had been charged for; but, under the circumstances, we can but regard him as a mere volunteer, going to this office for his own pleasure.

In the case of *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129, 98 Am. Dec. 317 (point 4 of the *syllabus*), it was held: "A trespasser may maintain an action for wanton or intentional injury by the owner of the land," and in point 5: "The owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common."

In that case the facts were as follows: A large crowd had congregated on the platform at the depot for the purpose of seeing the president of the United States, who was to pass the depot at a certain hour. The platform fell by reason of the unusual weight, and the plaintiff was thereby injured.

Sharswood, J., in delivering the opinion of the court, said: "The platform was open. There was a general license to pass over it, but he was where he had no legal right to be. His presence there was in no way connected with the purposes for which the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendants, as much as if he was actually a passenger; and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have a structure strong enough to bear all who could stand on it; as to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that." . . . "I am bound to have the approach to my house sufficient for all visitors on business or otherwise, but if a crowd gathers upon it to witness a passing parade, and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd; I owe no duty to him."

In that case the court held that the court below was right in directing the jury to find a verdict for the defendant.

In the case of *Pittsburgh etc. Ry. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751, it was held: "A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection and maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or any business connected with the operation of the road."

While I am disposed to regard the plaintiff in this case as a mere volunteer, going upon the premises of the defendant for the purpose of pleasure or pastime, yet, giving the circumstances the most favorable construction that can be given for the plaintiff, we can consider him as nothing more than a licensee; that is (as defined by Patterson in his *Railway Accident Law*, page 176, section 181), "persons who be neither passengers, servants, nor trespassers, and not standing in any contractual relations to the railway, are permitted by the railway to come upon its premises for their own interests, convenience, or gratification."

In the case of *Sutton v. New York etc. R. R. Co.*, 66 N. Y. 243, the railway was held not to be liable to licensees for a failure to set the brakes on the cars stored on a siding, or otherwise block them to prevent their moving by force of the wind or by gravity.

So, also, Pierce on Railroads, page 275, says: "But the duty and liability to keep its premises safe for public use do not arise out of a bare license or permission to use its premises. Still less do they exist in favor of a trespasser, although the company will be liable even to him for a wanton injury."

In the case of *Parker v. Portland Publishing Co.*, 69 Me. 173, 31 Am. Rep. 262, the court held: "No duty is owed to a mere licensee, and he has no cause of action for negligence in the place he is permitted to enter."

In the case at bar there is no controversy about the facts, the only witnesses introduced being those called by the plaintiff. It was held in the case of *Gonzales v. New York etc. R. R. Co.*, 38 N. Y. 440, 93 Am. Dec. 58: "A question of negligence is one of law, where facts are uncontroverted." In the case of *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, the court held, in its opinion, delivered by Harlan, J., that "where a case fairly

depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury under proper directions as to the principles of law involved"; and in section 1 of *syllabus*: "A case should not be withdrawn from the jury unless the facts are undisputed, or the testimony is of such conclusive character that a verdict in conflict therewith should be set aside."

So, also, in the case of *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, it was held (first point of *syllabus*) that "when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant."

This court, in the case of *Johnson v. Baltimore etc. R. R. Co.*, 25 W. Va. 571, while it holds, in the third point of the *syllabus*, that "negligence is in most cases a mixed question of law and fact, and generally what particular facts constitute negligence is a question for the determination of the jury from all the evidence before it bearing on the subject, rather than a question of law for the determination of the court," yet, in the fifth clause of *syllabus*, in the same case, this court holds that "if the facts are unambiguous, and there is no room for two honest and apparent reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute."

Now, taking the entire evidence that was introduced in this case, there is nothing that indicates that the plaintiff was either directly or indirectly induced by the defendant to visit this office; but, on the contrary, it is clear from all the circumstances that he went there without invitation, either express or implied, and while no one objected to his visiting the place, yet the law fixes the liability of either a corporation or an individual towards a party who comes upon their premises as the plaintiff did in this case; and as we have said above, he cannot be regarded in a more favorable light than an ordinary licensee.

In the case of *Nichols v. Washington etc. R. R. Co.*, 83 Va. 102, 5 Am. St. Rep. 257, the court says: "Now, it is agreed on all hands that there is a wide difference between the obligations which a person or a corporation owes to a mere licensee and the duty which the same person or corporation owes to one who comes upon his premises by an invitation, either ex-

press or implied. In the first place, it is generally admitted that the party comes at his own risk, and enjoys the license subject to its concomitant risks or perils, and that in such case no duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee."

Numerous authorities have been cited by counsel for the plaintiff in error seeking to show that the defendant in the case under consideration owed some duty to the plaintiff; but having arrived at the conclusion that the plaintiff in error stood upon the footing of a mere licensee, we are of the opinion that the defendant owed no duty to the plaintiff's decedent other than that it was its duty not to willfully or wantonly injure him, and that in going upon said premises, under the circumstances of this case, he enjoyed the license, subject to the risks and perils attendant thereon, and for these reasons we are of the opinion that there is no error in the judgment complained of, and the same must be affirmed, with costs and damages to the defendant in error.

Affirmed.

REAL PROPERTY — LICENSEE MUST TAKE PREMISES AS HE FINDS THEM. — A bare licensee must take the premises as he finds them, and has no cause of action if injured on account of dangers there existing: *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44; 31 Am. St. Rep. 520, and note; *Cusick v. Adams*, 115 N. Y. 55; 12 Am. St. Rep. 772, and note; *Stevens v. Nichols*, 155 Mass. 472; *Walker v. Winstanley*, 155 Mass. 301; *Sterger v. Van Sicklen*, 132 N. Y. 499; 28 Am. St. Rep. 594, and note.

REAL PROPERTY — DUTY OF OWNER TOWARD LICENSEE. — A trespasser upon the premises of another cannot recover for any injuries received while there, unless he can show that they were wantonly inflicted, or that the owner, being present, might have prevented the injury by the exercise of reasonable care: *Frost v. Eastern R. R.*, 64 N. H. 220; 10 Am. St. Rep. 396, and note; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and note; *Emry v. Roanoke Nav. etc. Co.*, 111 N. C. 94; *Clark v. Manchester*, 62 N. H. 577; note to *Bedell v. Berkey*, 15 Am. St. Rep. 374; *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317, and note. See extended note to *Zoebisch v. Tarbell*, 87 Am. Dec. 661, and monographic notes cited therein, for a full discussion of the subject; also *Plummer v. Dill*, *ante*, p. 463, and note.

NEGLIGENCE, WHO MAY COMPLAIN OF. — To justify a recovery for alleged negligence, it must be shown that the defendant neglected a duty or obligation which he owed to him who claims damages for the neglect: *Wilsons v. Chicago etc. R. R. Co.*, 135 Ill. 491; 25 Am. St. Rep. 397, and note; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644, and note.

TRIAL — DIRECTING VERDICT. — The court may instruct the jury to return a verdict for either party when it is plain that a contrary verdict would be

allowed to stand: *Moore v. McKenney*, 83 Me. 80; 23 Am. St. Rep. 753; *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630. Where, at the close of the plaintiff's case, there is no evidence to support his cause of action, the court may direct the jury to find for the defendant: *Roden v. Chicago etc. R'y Co.*, 133 Ill. 72; 23 Am. St. Rep. 535; *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281.

DANIEL'S ADMINISTRATOR v. CHESAPEAKE AND OHIO RAILWAY CO.

[36 WEST VIRGINIA, 397.]

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT. — He who engages in the employment of another for the performance of a specified duty for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such duty, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants.

MASTER AND SERVANT — VICE-PRINCIPAL, LIABILITY FOR. — For the breach of any duty which a master so owes to a servant that he must perform it in person or by his agent, appointed for that purpose and commonly called a vice-principal or middleman, the master is responsible to a servant injured thereby without his contributory negligence, and where the breach of the duty is by the vice-principal it is not material what his place or grade of service is.

MASTER AND SERVANT — DUTIES WHICH MASTER CANNOT ASSIGN. — A master must exercise in the carrying on of his business all the watchfulness over his servants, and employ all the safeguards, which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, the master is answerable to him, and this remains true though the master had deputed to another employee or servant the performance of the neglected duty.

MASTER AND SERVANT — VICE-PRINCIPALS. — A RAILWAY CONDUCTOR having the entire control and management of a train is the personal representative or vice-principal of his employer, for whose negligence such employer is answerable to subordinate servants.

RAILWAY CORPORATIONS — LIABILITY TO SERVANT FOR NEGLIGENCE OF PERSON IN CHARGE OF A TRAIN. — If an assistant yard-master in charge of a train or part thereof, and having with respect to it the same duties and authority as a conductor, knowing that it is standing on the track at a point between stations and cannot be moved for some time, and that before it can be moved another train will be due at the same place, negligently fails to place warning signals at a sufficient distance from the standing train to warn the anticipated approaching train to stop, in time to avoid a collision, his negligence is chargeable to the corporation in whose employment he is, and renders it answerable in damages for the injury and death of a brakeman, who, while on the approaching train, is killed by its collision with the standing train, such collision being due to such negligence of the assistant yard-master.

NEGLIGENCE, WHAT IS NOT CONTRIBUTORY. — Though an employee of a railway corporation is not at the time of a collision and of his injury thereby,

at his post of duty, or at the place where the rules of the company require him to be, and his conduct contributed to the accident, yet if such conduct was not the direct, immediate, and proximate cause of the accident, and it could have been avoided by the exercise of ordinary care and diligence, which the corporation and its vice-principal failed to exert, then it is answerable to such brakeman, or his representatives, for the injuries received by him in such accident.

Simms and Enslow, and J. E. Chilton, for the plaintiff in error.

Wm. R. Thompson, for the defendant in error.

HOLT, J. This is a suit in the circuit court of Summers County, brought 31st March, 1890, by plaintiff below against the railway company, defendant below, for causing the death of Robert Daniel, plaintiff's intestate, by its negligence, while the decedent was a servant in the railway company's employ. The suit resulted in a verdict for three thousand seven hundred and fifty dollars damages, which the court refused to set aside, but gave judgment thereon. To this ruling and various other rulings made during the trial the defendant company excepted and has obtained this writ of error.

The suit is based on sec. 5, c. 103, Code, p. 725 (ed. 1891): "Whenever the death of a person shall be caused by wrongful act, neglect, or default," etc. — the West Virginia form of the Lord Campbell Act.

The declaration contains three counts. The first charges that plaintiff's intestate was in the railway company's employ as a brakeman, and while in discharge of his duties, defendant by its recklessness, carelessness, and negligence then and there caused the death of plaintiff's intestate. The second count alleges as the defendant's act or neglect and default that it carelessly left standing on its line, one mile from any station or side-track, a train of cars, into which the deceased brakeman's train, without warning, was run, without any fault on the part of the running train, which caused the brakeman's death, etc. Third count sets out the facts of the accident in great detail, averring that they resulted in the brakeman's death, directly caused by the wrongful act, neglect, and default of defendant; thus giving plaintiff, by reason of the premises, a right of action for ten thousand dollars the damages sustained, the maximum fixed by law.

The demurrer was properly overruled, because the court could have given judgment on either count according to the very right of the cause, and according to law; the case is alleged being proved.

On the plea of "not guilty" the issue was made up and tried by the jury.

The facts are as follows: Robert Daniel, plaintiff's intestate, was at the time of the accident a brakeman in the employment of defendant on section two of No. 78, a freight train on defendant's road. His run was from Sewell to Hinton and back. Freight train No. 78, between these points, was run in two sections. J. W. Spease was assistant yard-master of the railway company at Hinton.

On the twenty-sixth day of March, 1890, section one of defendant's freight train had reached Hinton, Spease took charge of it, to break up the train, distribute the cars, etc., according to his duty, and for this purpose the cars were at some point uncoupled. On these cars, thus left to stand until Spease had disposed of the others, Sweno, the brakeman, had neglected to set the brakes; so that, when Spease uncoupled and moved off with engine and front cars, the four rear cars ran back by gravity down the track to the mouth of Tug creek, a mile and a half west of Hinton towards Sewell. Here they stopped.

Spease was engaged in shifting the front part of section one about fifteen or twenty minutes, and when he returned with his engine he found that the rear portion of the train, which had been left, had escaped, and run back down to Tug creek, as already described — a point between one and a half and two miles from Hinton, on the main line. As soon as Spease found the cars had escaped, he started with the engine in pursuit, having with him, the engineman of the yard-shifter locomotive, and a brakeman and workman, all under Spease's control. They found the runaway cars at Tug creek.

It was proven that J. M. Spease had as full command and charge of section one of No. 78, and of the part which escaped and ran back to Tug creek, as a conductor has while in charge of his train and running it on the road, and the like power of control and command over the escaped part while it stood at Tug creek. Spease also knew that section two, on which Daniel was engaged as brakeman, was following section one of No. 78, and was then due at Hinton.

When Spease reached the escaped cars at Tug creek, Spease's brakeman immediately began to try to couple up the escaped cars to the cars brought down with the engine from the yard at Hinton; he had two couplings to make, and attempted to make one of them some fifteen times, but the link

was bent and he failed, and was still attempting to couple them when the engineer on the coming section No. 2 of No. 78 blew down brakes just before the collision occurred. The time was 3:30 in the morning. It was dark and foggy.

There were two brakeman, — Robert Daniel, the one killed by the collision, and another on said second section of train No. 78, — and, if both had been standing at the brakes and applied them immediately when the signal sounded down brakes, the accident could not have been averted. The train was a freight train, running at the rate of eighteen or twenty miles an hour. Spease had charge of the train, including the escaped cars, and had with him under his control the engineer, brakeman and a workman from the round-house, and no one else was present.

Spease, as the rules of the company required, went back in the direction from which section two (the coming train) was expected, for the purpose of flagging or to signal it to stop, but he went back from the rear of his own train standing on the track at Tug only some fifty or one hundred yards, instead of one thousand two hundred yards as required by the rules of the company. He had ample time to have gone back the distance required to flag if he had desired to do so, before the expected train came. A red light is used and required by the rules for the purpose of flagging; but Spease on this occasion had a white light. He overtook the escaped cars more than thirty minutes before the accident occurred, and had at least thirty minutes in which to have gone back to flag the expected train, and if it had been flagged six hundred yards from the rear of Spease's train the expected train could have been stopped, and the accident averted.

It was also proved that at the time of the collision and wreck it was the duty of the conductor to flag between stations, and the duty of the brakeman to flag at stations, and that, when a train was stopped by accident or obstruction, the flagman must immediately go back with danger signals, to stop any train moving in the same direction. At a point six hundred yards distant he must place one torpedo on the rail. He must then continue to go back at least one thousand two hundred yards from the rear of his train, and place two torpedoes on the rails, ten yards apart; then return to a point nine hundred yards from the rear of his own train, and there remain until recalled by the whistle of his own engine; but if

a passenger train is due within ten minutes he must remain until it arrives, etc: See rule 99 in schedule 357.

Instead of this, the conductor for the occasion (the yard-master) went back but fifty or one hundred yards, with a white light instead of a red one. The morning (3:30) was dark and foggy. The coming train rushed on at a speed of eighteen or twenty miles an hour. The engineer sounded down brakes, reversed his engine, and sprang off just in time to save himself. All escaped by jumping off except front brakeman Daniel, who was at the time of the collision standing at the rear of the tank attached to the rear of the locomotive, and had no duty to perform in the engine cab except to keep out of the weather, and by the rule he was not permitted to ride on the engine cab, except when called there by some duty, without a written order from the proper authorities, and it does not appear whether he had such permit or not. Daniel was caught in the wreck and killed; the others escaped by jumping off the train. Seven or eight of the front cars of the second section were by reason of the collision shattered, broken up, and derailed.

If the expected train had been flagged at a point seven or eight hundred yards from the obstructing train standing on the main line, the train could have been stopped in time to avoid the collision. The deceased was a young man of good habits, sober, frugal, and industrious, twenty-one years old, and earning from fifty to sixty-five dollars per month. Thereupon the following instructions were given for the plaintiff:—

Instruction No. 1, given for plaintiff: "The court instructs the jury that if they believe from the evidence that on the twenty-sixth day of March, 1890, one Spease was in the employ of the defendant as assistant yard-master at Hinton, and that as such assistant yard-master said Spease was in charge of a train of cars, or part of a train of cars, belonging to the defendant, known as the 'first section of No. 78,' at a point on the line of the said railroad of defendant between one and two miles west of Hinton; and that said Spease, as to such train of cars then in his charge, had all the rights and authority, and was charged with all the duties, of a conductor in charge of one of the trains of cars of the defendant; and that the plaintiff's decedent, R. Daniel, was in the employ of the defendant on one of the defendant's trains of cars known as 'second section of No. 78,' and that said Spease knew that at the time he was in charge of said train of cars known as

'first section of No. 78,' standing on the main line of defendants' railroad at Tug creek, that said train of cars known as 'second section of No. 78,' was liable at any moment to come along said railroad on its way to the yards at Hinton on the same track upon which the train of cars of which said Spease was then in charge was standing; and the said Spease also knew that said train of cars, or part of the train of cars, of which he, the said Spease, was then in charge as aforesaid, could not be moved immediately in the direction of the yards at Hinton because of the said train of cars not being coupled together, and that said Spease undertook to flag said second section of train No. 78, upon which plaintiff's decedent, R. Daniel, then was as a brakeman, and failed to go back in the direction from which said second section of No. 78 was approaching, more than fifty or one hundred yards, and that said Spease had ample time, and could have gone back a sufficient distance to have warned said section of No. 78 of the obstruction of the railroad track in time for said second section of No. 78 to have been stopped, and to have prevented the accident which did occur; and, if the jury further believes that this conduct on the part of Spease was negligence, and was the immediate and proximate and direct cause of the accident and the death of plaintiff's decedent, R. Daniel, then the negligence of said Spease is the negligence of defendant, and the jury must find for the plaintiff."

Instruction No. 2. given for the plaintiff: "The court instructs the jury that if they believe from the evidence that plaintiff's decedent, R. Daniel, was in the cab of the engine attached to the second section of train No. 78 on the morning of March 26, 1890, at the time the accident occurred, and that said R. Daniel had no right to be there, but should have been at the brakes on the cars in said train, and that his being in said cab contributed to the accident which occurred and resulted in his death, yet, if the jury further believe that said conduct upon the part of said Daniel was not the direct, immediate, and proximate cause of said accident and his death, and that the defendant could, by the exercise of ordinary care and diligence, have avoided the accident, and prevented the death of said R. Daniel, and that defendant failed to exercise and use such ordinary care and diligence to avoid said accident and prevent said killing of said R. Daniel, then the defendant is liable for said killing, and plaintiff is entitled to recover in this case."

The following instructions were given for defendant:—

Instruction No. 1, given for defendant: "The court instructs the jury that a servant entering the employment of a master assumes all the ordinary risks of such employment and service, and one of such ordinary risks so assumed by the servant is that of liability for negligence of a fellow-servant in a common employment of such master."

Instruction No. 4, given for defendant: "The court instructs the jury that, if they believe from the evidence that Robert Daniel and Frank Sweno were fellow-servants in the defendant's employ, then the defendant is not liable in this suit for any injury done the said Robert Daniel by the negligence of the said Sweno in discharging his duties as such fellow-servant."

Instruction No. 10, given for defendant: "The court instructs the jury that if they believe from the evidence that Frank Sweno and R. Daniel were brakemen in the employ of the defendant, and had the same duties to perform, and did the same work for the defendant, except they run on different trains, and neither had any authority over the other, and neither had any duty to perform for the other which should have been performed by the defendant, and that the negligence of the said Sweno in the performance of his duties as such brakeman was the immediate cause of the death of said Daniel while in the discharge of his duties as such brakeman, and that the negligence of J. W. Spease, another employee of the defendant, was the remote cause of said Daniel's death, then the jury will find for the defendant."

Instruction No. 12, given for defendant: "The court further instructs the jury that before they can find for the plaintiff in this case they must find from the evidence that the plaintiff's decedent, Robert Daniel, came to his death by reason of the negligence of the defendant, or some of its employees, who were not fellow-servants of said Daniel in the defendant's employ, and that, if the jury believe that the negligence of the defendant or some of its employees was the remote cause of the death of said Daniel, and contributed to his death, and that the negligence of the said Daniel was the proximate, direct, and immediate cause of his death, then the defendant is not liable, and the jury will find for the defendant."

Instruction No. 16, given for defendant: "The court instructs the jury that they cannot in this case assess against the defendant vindictive or punitive damages; and by such

'punitive damages' is meant damages to punish the defendant for any wrong; and by 'exemplary damages' is meant damages which may be assessed to make an example of the defendant, and set it on example. Damages for neither of said purposes can be assessed against the defendant in this case."

Instruction No. 17, given for defendant: "The court instructs the jury that in case they find for the plaintiff, they will assess plaintiff's damages at any sum, so as not to exceed ten thousand dollars, which, in the judgment of the jury, may be 'just and right,' and that in assessing such damages to the plaintiff, they cannot take into consideration the sorrow of his relatives because of the death of R. Daniel, or the loss of his society or company from the plaintiff and his relatives, and that the true measure of damages in this case is the pecuniary loss to the estate of R. Daniel by reason of his death."

Instruction No. 18, given for defendant: "The court instructs the jury that in case they should find for the plaintiff, they will assess his damages at such sum as they may deem just and right, so as not to exceed ten thousand dollars, and they may assess said damages at any sum under ten thousand dollars which they may deem just and right, and that in assessing such damages the true measure of the plaintiff's damage is the pecuniary damage to the estate of R. Daniel sustained by reason of his death, and that such pecuniary damage is what should govern the jury in assessing the plaintiff's damage in this case."

Instruction No. 19, given for defendant: "The court further instructs the jury that in assessing the damage in this case they cannot take into consideration the sorrow of R. Daniel's friends and relatives because of his death, or their sorrow at his loss; nor can the jury in this case assess damages for the purpose of making an example of the defendant or teaching the defendant a lesson."

Instructions Nos. 2 and 8, as modified by the court, and then given for defendant, are as follows:—

Instruction No. 2: "The court further instructs the jury that all servants of the same master, engaged in a common employment, and who have no authority or superiority over each other, and who are working together, and have equal opportunities to control and influence the conduct of each other, and to none of whom has been delegated the performance of any duty owing by the master to such servant, are all fellow-servants in such employment."

Instruction No. 8: "The court instructs the jury that if the defendant had in its employ one Frank Sweno as a brakeman on one of its trains, and that it was the duty of such brakeman to assist in running said train from Sewell to Hinton, and that the defendant also had plaintiff's decedent, R. Daniel, in its employ as a brakeman on another of its said trains running between said points, and that the duties of said Daniel and said Sweno were the same, and they performed the same work and were in the same service for the defendant, but on different trains, and that the negligence of said Sweno in the performance of his duty as such brakeman on his train caused the death of the said Daniel while engaged in his duties as such brakeman, and that the said Sweno had no authority over the said Daniel, and had no duty to perform, due from the defendant to said Daniel, which the said Daniel did not likewise have to perform for him, the said Sweno, and were so far working together as to be practically co-operating and to have opportunity to control and influence the conduct of each other, and had no superiority the one over the other, then the jury will find for the defendant."

And the court refused the following instructions asked for by the defendant:—

Instruction (refused) No. 3: "The court instructs the jury that all brakemen in the employment of the defendant company, whether on the same or different trains, are fellow-servants, and that one brakeman of the defendant cannot recover damage from the defendant because of any injury sustained by him by reason of the negligence of any other brakeman in discharging his duties as such brakeman."

Instruction (refused) No. 5: "The court instructs the jury that the assistant yard-master in the defendant's employ on its yard at Hinton and all brakemen on the defendant's trains are fellow-servants."

Instruction (refused) No. 6: "The court further instructs the jury that if they believe from the evidence that one Spease was employed by the defendant company as the assistant yard-master on its yards at Hinton, and that his duties as such required him to receive and take charge of all trains run on to such yards, and to overlook and care for such trains, and to have control of them while on such yards, and that plaintiff's decedent, R. Daniel, was a brakeman on one of defendant's trains which run to and from the said yards, and that said Spease and said Daniel were both engaged in

their respective positions in running and caring for defendant's trains, and that the said Spease had no authority over the said Daniel, and that the defendant had not delegated to the said Spease the performance of any duty it owed the said Daniel as its servant, then the said Spease and the said Daniel were fellow-servants of the defendant; and if the said Daniel was killed while in the service of the defendant as such brakeman by reason of the negligence of the said Spease in the performance of his duties as such assistant yard-master, the defendant is not liable for the death of said Daniel, and the jury will find for the defendant."

Instruction (refused) No. 7: "The court further instructs the jury that if they believe from the evidence that **one Frank Sweno was in the employ of the defendant company as a brakeman on the first section of one of its freight trains, and as such brakeman it was a part of his duties to set sufficient brakes on such first section of said train before leaving it on the yards at Hinton to hold it thereon, and that he neglected such duty and failed to set any brakes on said train, and that by reason of the failure of said Sweno to set the said brakes, a part of the cars in said train got loose, and ran on the main line of defendant's railway, on which main line there was another train of the defendant, about two miles below where the cars got loose, and thereby caused a collision of such other train, and in such collision the plaintiff's decedent, R. Daniel, was killed, and that at the time said R. Daniel was so killed, he was on such other train in the defendant's employ as a brakeman thereon, and that the direct and immediate cause of the said collision and the said killing therein of said Daniel was the negligence of the said Sweno in failing to set the said brakes on the said first section, then the jury will find for the defendant."**

Instruction (refused) No. 9: "The court instructs the jury that if they believe from the evidence that **Frank Sweno and R. Daniel were employed by the defendant as brakemen on its trains, and were employed as such brakemen on different trains of the defendant running between Hinton and Sewell, and that their duties as such brakemen were the same, and one had no authority over the other, and that the defendant had in its employ one J. W. Spease as an assistant yard-master on its yards at Hinton, and that the duties of said Spease was to care for and look after all trains while on said yard, and that the said Spease had no control or authority**

over either the said Sweno or Daniel, and had no duty to perform which the defendant owed the said Daniel, and all of said parties were engaged by the defendant in handling, caring for, and running its trains on its said road, and that the said Daniel, while so employed as such brakeman, was killed by reason of the joint negligence of the said Sweno and Spease in each failing to perform his duties in his respective position, then the jury will find for the defendant."

Instruction (refused) No. 11: "The court instructs the jury that if plaintiff's decedent, R. Daniel, was killed by the negligence of J. W. Spease, and that at the time said Daniel and Spease were in the defendant's employ, and the duties of the said Daniel were those of brakeman on one of defendant's train running between Cannelton and Hinton on defendant's railway, and the duties of the said Spease was to take the control, care, and management of defendant's trains while on its yard at Hinton, and that by reason of the carelessness of the said Spease in discharging his duties in taking care of and managing the trains and cars on said yard, certain cars got away from him and caused the death of said Daniel, and that the death of said Daniel was caused by the negligence of said Spease, then the jury will find for the defendant, unless the jury further find that the defendant owed the said Daniel some duty which it had delegated the said Spease to perform, and which he failed to perform, and that by reason of such failure to perform such duty the said Daniel was killed; and the jury are the judges from all the facts and evidence before them whether or not the defendant had so delegated the said Spease to perform any duty it owed said Daniel as its servant, and if he did fail to perform such duty, if such failure caused the said Daniel's death."

Instruction (refused) No. 13: "If the jury believes from the evidence that Robert Daniel was in the employ of the defendant as a brakeman on one of the freight trains, and that as such brakeman it was the duty of such Daniel to be on the cars and attending to his duty as such brakeman, and the said Daniel, in violation of the rules of the defendant, left his place as such brakeman and went into the cab of the locomotive of such train, and by reason of his being on said locomotive received injuries which resulted in his death, then the plaintiff cannot recover in this suit."

Instruction (refused) No. 14: "The court instructs the jury that if they believe the plaintiff's decedent, R. Daniel, was a

brakeman in the defendant's employ, and as such brakeman there was a rule of the defendant 'that prohibited the said Daniel from going into the cab of the locomotive, excepting when necessary,' and that said Daniel knew of such rule, and that he was engaged on one of defendant's trains as such brakeman, he went into the cab of the locomotive pulling such train when it was not necessary; and, further, that the said Daniel violated the said rule when he so went into said cab, and that the said Daniel was killed while so in said cab, and that the fact that the said Daniel was in said cab contributed to causing his death, then the jury can take such action of the said Daniel in going into said cab in consideration in assessing the damages against the defendant for the death of said Daniel."

Instruction (refused) No. 15: "The court instructs the jury that if they believe from the evidence that the plaintiff's decedent, R. Daniel, was in the employment of the defendant as a brakeman on one of its freight trains, and that the said Daniel's place, as such brakeman, was at the brakes on the cars in such train, and that said Daniel, in violation of the rules of the said defendant, left his place on said cars, and went into the cab of the locomotive pulling such train, and that the said Daniel at such time knew it was a violation of the rules of the defendant to go into said cab, and that while the said Daniel was in said cab he was injured and killed by reason of the negligence of the defendant or its servants, and that the said Daniel being in said cab contributed to his injuries and death, then the jury may consider the said fact that said Daniel was in said cab in assessing the damage they may give in this case against the defendant, and may consider such fact in mitigation of the damages they may assess herein against the defendant."

It is not necessary to discuss the question whether the injury was the direct result of the negligence of his fellow-servant, the brakeman at the yard by whose neglect to set brakes the cars escaped and ran down to Tug creek, where they were found. That was the occasion of the accident; the negligence of the yard-master in charge and conduct of the train at Tug creek was the cause, direct and proximate, so that the only real question is, was such yard-master, under the circumstances, a vice-principal of the master, or only a fellow-servant of the deceased brakeman?

Upon this point the main controversy seems to turn, and the arguments on both sides are directed to the question, what are the test or tests to be applied to the breach of duty complained of, to determine whether it is a violation of a personal duty of the master to the servant, and done by his vice-principal, in which case he would be liable, or a violation of a non-personal duty, in which case he would not be liable; because the yard-master, as conductor, would then be a fellow-servant with the deceased brakeman, and the risk of injury by him one of the risks assumed by the brakeman as incident to the employment?

The counsel have concentrated their arguments around four cases, treated as a group, which have attained much more than a local consideration, especially the "Madden case." These, taken in the order of time, are *Cooper v. Pittsburgh etc. R'y Co.*, 24 W. Va. 37; *Riley v. West Virginia etc. R'y Co.*, 27 W. Va. 145; *Madden v. Chesapeake etc. R'y Co.*, 28 W. Va. 610; 57 Am. Rep. 695; *Criswell v. Pittsburgh etc. R'y Co.*, 30 W. Va. 798. We are also referred to *Hoffman v. Dickinson*, 31 W. Va. 142; *Humphreys v. Newport etc. Co.*, 33 W. Va. 135; and especially the case of *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377, called the "Ross Case." See, also *Unfried v. Baltimore etc. R. R. Co.*, 34 W. Va. 261.

We are referred to two text-books, and two only. I mention them because of the reference to them, and quotations made from them: 1. Bishop on Non-Contract Law, c. 32, "Master and Servant, Fellow-Servants," where the author, under the subhead of "Fellow-Servants," has brought together a vast array of cases on this perplexing and tangled subject, and within a narrow compass has treated the doctrine with his usual orderly arrangement, and in his clear and condensed style. I mention him now because I know his books to be reliable, and have drawn largely on his useful labors, even when not citing him or quoting literally. 2. The recent work of McKinney on Fellow-Servants, whose former labors in editing and annotating American and English Railroad Cases, and in contributing the article on "Fellow-Servants" in 7 Am. & Eng. Ency. of Law, 821, has well qualified him to give the profession this useful work: See Whittaker's *Smith on Negligence*. In this day reliable text-books have become an indispensable help to the courts as well as to the bar.

The touchstone we apply to the act of the employee to determine whether it is the negligent act of a vice-principal, and

therefore of the master, or the acts of a fellow-servant of the injured party, is the nature of his duties: See Bishop on Non-Contract Law, 665. He who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants.

But there are certain duties which the master owes to the servant. These he must perform in person, or by his agent, appointed for the purpose, called a "middleman" or "vice-principal." For the breach of these duties by the vice-principal, no matter what his place or grade of service, high or low, the master is responsible to the injured servant who has not directly contributed to and in part caused the injury.

Now we have reached the test: What are these personal duties which the master owes the servant, as distinguished and set apart from the non-personal duties, which comprehend the residue, and which Dr. Bishop calls the "assignable duties"? So far these personal duties have no well-defined common earmark of an inherent kind, and so far can only be safely ascertained for practical use by enumeration and analogy; and that has produced discord. All we can say is that the personal duty depends upon its own nature, and not upon the agent or servant who performs it.

In the cases already mentioned we have for us an authoritative enumeration of most, if not all, the well-settled personal (non-assignable) duties which the master owes his servant, no matter by whom performed.

In *Madden v. Chesapeake etc. Ry Co.*, 28 W. Va. 610-617, 57 Am. Rep. 695, Judge Snyder, delivering the opinion, says: "The duties of the master or employer may be summed up as follows: 1. To provide safe and suitable machinery and appliances for the business, including a safe place to work. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and in making proper inspections and tests. 2. To exercise like care in providing and retaining sufficient and suitable servants for the business, and instructing those who, from newness or age, evidently need it. 3. To establish proper rules and regulations for the service, and, having adopted such, to conform to them."

In Bishop on Non-Contract Law, sec. 683, the author defines the liabilities of the master by giving connectedly and with certain qualifications the following statement of these personal duties of the master: "The doctrine is that the master is not the insurer of his servants against accident in his service; yet he owes to them the duty of carefulness to a degree reasonable in the particular instance in providing for them, and keeping in safe repair appliances, and a safe place to work, in selecting suitable fellow-servants, and in giving the needed instruction to those who are new to the business, or of immature capacity; and for an injury which, through negligence in this duty, comes to a servant who is not himself contributively negligent he is responsible, but not for injuries from defects in the appliances or place not discoverable on due examination, or for the negligence of carefully selected servants, or for injuries from situations and appliances the risks whereof the servant has assumed."

Again, in section 691, he says: "The leading principle around which the others cluster is, that the master shall exercise in the carrying on of his business all the watchfulness over his servants and employ all the safeguards which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, he (the master) is answerable to him; but for casualties not traceable to any neglect, or to any other wrong in the master, he is not responsible."

So that we see that the doctrine of fellow-servant, as far as it has gone, where no statute prevails, has been built up, we are to presume, by the application of the common-law principles of common sense, common justice, common convenience, public policy, and private right, by gathering together the points of law thus adjudged by the application of these principles to particular facts, into rules more or less general, to be applied to new cases as they arise; so that in the formative process of any branch of the law they are not mere glittering generalities incapable of useful application.

One of the best illustrations of the locality of this dividing line, as far as ascertained between the personal and remaining non-personal duties of the master, is furnished by the case of *Collins v. St. Paul etc. R. R. Co.*, 30 Minn. 31: "If a railroad servant is injured because there is no headlight, the road is responsible; if because the headlight is not lit, it is not responsible": Bishop on Non-Contract Law, sec. 672.

The personal duties of the master are due in supplying the ways and means and appliances, keeping them safe and in repair by constant watchfulness and supervision. The residue of his duties—the non-personal—relate to the execution of the work, and breaches thereof by co-servants are included in the risks incident to the employment.

This brings us to the point involved, called the "Ohio and Kentucky doctrine," to some extent adopted (by a divided court) by the supreme court of the United States in the Ross case, found also in the English "Employer's Liability Act," and in the acts of some of our states, and understood to be sanctioned and adopted in this state, especially in the Madden case. This may also be regarded as cognate with the master's personal duty of superintendence. A superintendent is defined in the English act as a person whose sole or principal duty is that of superintendence, and who is ordinarily not engaged in manual labor: See McKinney on Fellow-Servants, 226. He is what we may call the "commanding (superior) servant," and his duty is the personal duty of the master, or limitation of the master's non-personal duties.

The same English act enumerates these vice-principals as follows: "Any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railroad": See McKinney on Fellow-Servants, 220. In these particulars, the Massachusetts act of 1887 corresponds with the English act.

It is significant as tending to show that both regard themselves as having gone astray in holding the conductor of the railway train to be a mere fellow-servant. They put it upon no expressed ground, but impliedly upon the ground that it is the duty of the master to conduct the train in person or by agent, making a vice-principal of the servant or agent who has charge or control of the locomotive engine or train upon a railroad, each making the employee thus injured not a fellow-servant *quoad* his right of recovery against the master.

This brings us to the Ross case and Madden case. In *Chicago etc Ry Co. v. Ross*, 112 U. S. 377-390, Justice Field says: "A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact and should be treated as the personal representative (vice-principal) of the corporation for whose negligence it is responsible to subordinate servants. . . .

In no proper sense of the term is he the fellow-servant with the fireman, the brakeman, the porters, and the engineers"; seeming to put it on the ground of control; but he returns to the duty of having a vice-principal present as the only means of having the company (the master) present, regarding his presence in some way on a running train as a thing to be taken for granted. "We agree with them" (the Ohio and Kentucky cases) "in holding, and the present case requires no further decision, that the conductor of a railway train who commands its movements, directs when it shall start, at what station it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible"; but again returning to the idea of the personal duty of the master to be in some way present, he adds: "If such a conductor does not represent the company, then the train is operated without any representative of its owner."

The *Cooper case*, 24 W. Va. 37, gives a full enumeration of the personal duties of the master already given; that the master cannot render such duty non-personal, no matter to what servant it may delegate this duty by vesting him with controlling or superior authority in regard thereto. The negligence of such servant is the negligence of the company, giving the nature of the duty as the test of its being the personal or non-personal duty of the master, and holding that the inspector and master mechanic, charged with the duty of keeping the appliances in repair, is the vice-principal of the master as to such duty, and not the fellow-servant of the brakeman; but the importance of the case for the matter in hand is the distinct personal duty of the master to exercise continued supervision over the appliances, and to keep them in good and safe repair, which of course implies the presence in some way of the master.

In *Riley's case*, 27 W. Va. 145, the court still deals with the performance of some personal duty of the master by some superintendent, foreman, or other employee of the company; a duty "which the master has impliedly contracted, or which rests upon him as an absolute duty." Here the master's personal duty of continued supervision, and to keep the road and running stock in good and safe repair and condition, is this time applied to the railway and track for the use of its employees. The brakeman on a train consisting of one engine

and tender was struck by a stump standing by the side of the railway. It was the negligence of a foreman who was intrusted with the personal duty of the master of keeping the road in repair.

The *Criswell* case, found in 30 W. Va. 798 was decided in 1888. Here the plaintiff's intestate who received the injury was at work for defendant in repairing defendant's railroad, and when killed was on a hand-car, going to the place of work. Foutz was his foreman in repairing the track, who stood in the place of the master in controlling and discharging those working under him. It was by his negligence that the deceased was injured. In the opinion the liability is placed on the ground of the *Madden* case: "That two servants of the same master are not fellow-servants when one acts in a superior capacity to the other in regard to some duty of the master." There was collision of a hand-car on the track, moving under the control of the foreman, with an extra train, by the negligence of such foreman, which caused the death of plaintiff's intestate. Here the foreman was in fact clothed by the master with the power to perform its duties to the servant injured, and the power conferred on the foreman was determined by the rules of the company.

We now return to our leading case upon the point here involved: *Madden v. Chesapeake etc. Ry Co.*, 28 W. Va. 610. An engineer upon one train of a railway company was injured by the negligence of a conductor of another train running in an opposite direction. Held, the engineer is not the fellow-servant of said conductor. The court put it distinctly on the ground that the conductor, in controlling and running his train, is the vice-principal of the master, and the master is liable for injury to its servants, caused by the negligence of the conductor in running and conducting its train; but Snyder, J., delivering the opinion of the court, on page 618, says: "The rule deduced from these principles and authorities would seem to be that two servants of the same master are not fellow-servants when one acts in a superior capacity to the other in regard to some duty due from the master; and the master is liable for any injuries to the subordinates caused by the carelessness or negligence of the superior."

Reading the headnote as given above with this deduction given in the body of the opinion, the conclusion may be drawn that the conductor in control of the railway train is, as to certain duties, the vice-principal of the master, and not the

fellow-servant of the brakeman and other employees of the common master. The negligence in this case was by negligently obstructing the track with his own train, so as to cause a collision with another train, causing the injury of its engineer.

We have now looked briefly at the Ross case, and at the group of which the Madden case may be regarded as the center, severally and separately, with reference to their peculiar bearing on the case in hand. Before I go back and put together the details I have been in search of, and put into juxtaposition this group represented by the Madden case and the Ross case, I wish to preface it with the matter of common observation.

I have seen a few among the very many criticisms on the Ross case. The leading one is based not on a denial of one of the principles impliedly put by the majority at the bottom of the ruling, but upon a misapplication of it, based upon a mistake, it is said, in the matter of common observation. It is a matter of common observation — the care they take (the railway company) the extreme and continual care and watchfulness, to make and keep the way safe before the coming and going trains. The moving train and the way are by eminence, literally as well as in figure of speech, "the ways and the means" to which their personal, as distinguished from their general non-personal, energies and efforts are directed.

In the Cooper case, the first of the group, the learned judge in his opinion takes continual supervision and watchfulness as the keynote of the railway company's duty in regard to the appliances. The common-law rule is not tied down and hampered by a fixed phraseology, so that time need not be wasted in quibbling over words; but that is within the rule which is within the meaning of the rule, and the meaning is determined by common reason and common justice. In a word, the spirit is not killed by the letter. Hence in the Madden case the safe way as well as the safe appliances was adjudged to be within the rule requiring continued supervision and watchfulness.

Dr. Bishop, as any one familiar with his method may see who will take the time and trouble to examine with some care his chapter on fellow-servants, entered the maze of fellow-servant cases, and marshaled them over and over again to find the leading string, and a test of a rule which would not offend our common reason and our common sense of right and wrong,

which would do right by the company, the master, as well as by the servant. His last word upon the subject is: "Watchfulness of ways and appliances is the central duty around which cluster all the personal (non-assignable) duties due the servant from the master."

Returning now to the Ross case and Madden case, and leaving out of view the reason of the rule as resting alone on the fact of superiority and subordination in control, if we take the facts of the case and the reason given impliedly by Justice Field and by Justice Miller (a venerable name, we may now say), and others who concurred, we find it to be the duty of constant watchfulness of the way and appliances, especially at the moving time and place, at the very moment of its supreme importance, when the great danger to the appliance was the running of it, and the great danger of the serious obstruction of the way was from the trains themselves, monsters of power moving with a momentum of five hundred tons and more, multiplied by more than the speed of the race horse, and a fearful obstruction to encounter when standing still, or when, as in these two cases, they were running together, one or both out of time or out of place by the fault of somebody.

Justice Field seems to take it as a concession that in these supreme needs of watchfulness and care as they arose from second to second in passing time, and from foot to foot in change of place, the master was surely present; and, if present, why not select the conductor as the one in control as his personal representative, and in subordination to him, the engineer, too, if need be, both helping for the occasion, together with the operator at the distance, in the constant, careful watchfulness in general; the one with his cunning hand on the lever, and his steady eye to the front; the other, passing through the appliances from end to end constantly. And Judge Snyder in the Madden case, and Judge Green, quoting it with approval in the Criswell case, held the conductor to be the one in authority, discharging the personal duty of the master, and by that test also, as well as by the test of "superior servant," the doctrine of fellow-servant did not come into play. In both cases there was negligence; in the Ross case on both trains. Justice Field takes the negligence found on the going train, and restricts the headnote to that. Judge Snyder applies it in effect to both.

This brings us to the case in hand, the facts of which do

not require for the solution of the point of law involved that we shall put the rule of the *Madden* case upon the one ground or the other,—superiority in isolated commands or the nature of the duty to be discharged. Both existed in the *Madden* case, as there held, and both exist here. Whether we call the yard-master a conductor simply, or a conductor *pro hac vice*, is not important. He was on the ground in command of the train. It was his duty to remove it, as dangerously barring the way of the coming train, which he knew must be close at hand, and to warn and give notice of the dangerous obstruction to the expected train, according to the rules.

We have already shown, and it is not necessary to repeat, the railway master cannot, by the requirement of its rules, shift the burden of a personal duty to other shoulders, and thus make the doctrine of fellow-servant apply, because it has no power to amend the general law. How far it may be regulated by contract, express or implied, the facts of this case do not require us to inquire. This, I take it, is the least settled of all. "If in words or by implication the servant has undertaken to assume a risk, he cannot have compensation of the master for an injury resulting therefrom": See *Bishop on Non-Contract Law*, sec. 674.

In the case of *Railway Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, Owen, C. J., says: "The policy of our law, as to the superior-servant rule, being well settled, it only remains for us to inquire whether the railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they (the railway company) shall not be held to a liability for the negligence of their servants which public policy demands shall attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and its foundation in public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."

This brings us to the instructions respectively given and refused.

Plaintiff's instruction No. 1. This instruction states hypothetically and correctly what the evidence certified tended to prove, with the rule of the *Madden* case correctly applied.

Plaintiff's instruction No. 2. This proceeds upon the supposition, and the facts and nature of the circumstances show the facts supposed to be true, that if plaintiff's intestate had

been right at his brake he could not possibly have prevented the collision; and that if the fact that he was out of place did not directly contribute to the injury, then plaintiff's right to recover, if any, was not thereby barred. This is the law as as laid down in the *Riley case*, 27 W. Va. 145, and in many other cases.

Defendant's instruction No. 1. This was properly given for defendant, and there is no one to complain.

Defendant's instruction No. 2. This was properly refused, because it is not in accordance with the law laid down in the *Madden case*; and if the court in that case put the master's liability not upon the single fact that the conductor of the train, as such, was performing a personal duty of the master as the superior in control, but also required that the conductor should be in discharge of some other personal duty, then it at the same time held that, so far as by running his train he obstructed the track to the hurt of another and subordinate servant, he was, as vice-principal *pro hac vice*, in discharge of the master's duty of watchfulness and care in keeping the track clear. Besides, the instruction given by the court in amendment of No. 2 was all that defendant could ask on this head.

Defendant's instruction No. 3. This instruction may or may not be correct, and it was properly rejected, there being no evidence fairly tending to show that the injury directly and proximately resulted from the negligence of the other brakeman; and, even if it did, it did not do so without the direct, intervening, proximate help of the negligence of the conductor.

Defendant's instruction No. 4. This is No. 3 in another form.

Defendant's instruction No. 5. This is abstract in one view and incorrect in the other, as already shown.

Defendant's instruction No. 6. In the *Madden case* the engineer on one train was injured by the negligence of the conductor of another train.

Defendant's instruction No. 7. This in one part assumes the fact in dispute, — that the negligence of the other brakeman caused the collision, — while the evidence shows that it was but the occasion; nor is there any evidence tending to show that it was the cause.

Defendant's instruction No. 8. This instruction is based on the theory that the negligence of the brakeman on the other train was the one direct, efficient, proximate cause of the in-

jury. It was properly refused as abstract if for no other reason; and, as amended by the court, and then given, defendant has no ground to complain of it.

Defendant's instruction No. 9. This is based on the theory, that upon the facts, such as there was evidence tending to prove, the two brakemen and the conductor were fellow-servants. If there had been any evidence tending to support this theory, it would have been enough, whether the transgressors acted jointly or severally.

Defendant's instruction No. 10. This has been already disposed of. There is no evidence tending to show that the negligence of the other brakeman was the immediate cause of the death of plaintiff's intestate, and the negligence of Spease, the conductor, the remote cause. The tendency of all the evidence is to show the reverse.

Defendant's instruction No. 11. The uncontradicted evidence shows that it was the duty of Yard-Master Spease to take and conduct a train down to Tug creek, and bring back the runaway cars; and that brings him, for at least the only occasion here material, within the rule in the Madden case. The latter clause of this instruction may have been correct, but it need not be examined, because the court was not asked to consider it separately.

Defendant's instruction No. 12. The ground of the first branch of this instruction was sufficiently covered by instruction No. 1 given for plaintiff, and that of the second branch by plaintiff's instruction No. 2.

Defendant's instruction No. 13. This instruction, also on contributory negligence, was covered in a practical, concrete way by instruction No. 2 given for plaintiff.

Defendant's instruction No. 14. The evidence shows affirmatively that the death of the brakeman on the coming train was not caused contributorily or otherwise by Daniel's violation of any rule, whether he knew it or not, but by the negligence of the conductor in not observing the rule which required him to give Daniel's expected train warning that the track was obstructed by his, the conductor's own train.

Defendant's instruction No. 15. This was properly disposed of by instruction No. 2, given for plaintiff, which covered the same point of law, which has been held to be correct in substance. Besides it is abstract, there being no evidence that the brakeman's own conduct contributed in any degree to his death.

Defendant's instructions Nos. 16, 17, 18, and 19 were given. If either of them should happen to be wrong in any particular, — they seem to be correct, — plaintiff is not to blame for it.

In conclusion, although counsel should have full liberty to manage their cases in their own way, present all points of law for instruction that may arise, and the same point in different phases out of abundant caution, still they should consider that the time of the circuit court is precious, and that too much caution of this sort might tire out the most patient temper.

Judgment affirmed.

MASTER AND SERVANT — ASSUMPTION OF RISKS. — Every servant assumes the obvious risks of the service into which he enters: *Fitzgerald v. Connecticut etc. Paper Co.*, 155 Mass. 155; 31 Am. St. Rep. 537, and note; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and note.

MASTER AND SERVANT. — VICE-PRINCIPAL — MASTER'S LIABILITY FOR: See *Louisville etc. R'y Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443, and note; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Colorado etc. R'y Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note; *Sweeney v. Gulf etc. R'y Co.*, 84 Tex. 433; 31 Am. St. Rep. 71, and note with cases collected.

RAILROADS — CONDUCTOR OF TRAIN AS VICE-PRINCIPAL. — A conductor of a railroad train is not a fellow-servant of a brakeman: *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; *ante*, 814, and note.

CONTRIBUTORY NEGLIGENCE — WHEN DOES NOT BAR RECOVERY. — Contributory negligence cannot be invoked as a defense unless it is the proximate cause of the injury: *North Birmingham etc. R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105; *Memphis etc. R. R. Co. v. Jobe*, 69 Miss. 452. When at the time an injury is inflicted it might have been avoided by reasonable care on the part of the defendant, the plaintiff can recover damages notwithstanding his previous negligence: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note; *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note with cases collected.

McFADDEN v. CRAWFORD.

[36 WEST VIRGINIA, 67L.]

FIXTURES — UNATTACHED MACHINERY. — Spike machines, weighing two and a half tons, intended to be placed and permanently used in a rolling mill, one of which was on the cars by the side of the mill and the other unloaded, the foundations of both being all prepared in the mill, are parts of the realty, and cannot be levied upon and sold as personal property. If so levied upon and sold, the purchaser acquires no title thereto.

ATTACHMENT. — IF A STATUTE REQUIRES THE LEVY OF AN ATTACHMENT UPON REAL ESTATE to be indorsed upon the writ, stating as nearly as may be, the quantity and location thereof, a levy upon fixtures which are a part of the realty, not followed by such indorsement, is void.

DETINUE DOES NOT LIE FOR THE RECOVERY OF FIXTURES which are attached to and a part of the realty.

Meighen and Oldham, for the appellant.

H. Criswell for the appellee.

ENGLISH, J. This was an action of detinue, brought by G. S. McFadden against James Crawford in the circuit court of Marshall County, on the thirty-first day of August, 1889, to recover two railroad spike machines, of the alleged value of five hundred dollars each. The defendant demurred to the plaintiff's declaration, which demurrer was overruled. He then pleaded the general issue, and the case was submitted to a jury, which resulted in a verdict in favor of the plaintiff for the recovery of the possession of said railroad spike machines, if that could be had, and if not, the value thereof, which they ascertained to be \$500 for each machine, and \$250 damages for the detention of said property; and thereupon the defendant, by his attorneys, moved the court to set aside the verdict of the jury, and grant him a new trial, upon the ground that the verdict was contrary to the law and the evidence; and on the fifteenth day of November, 1890, the parties appeared by their attorneys, and the plaintiff remitted all of the damages found by the jury in their verdict, except \$30, and the court, after considering the motion made by the defendant at a former term for a new trial, overruled the same; and it appearing that the plaintiff was already in possession of the two railroad spike machines mentioned in the writ and in the verdict of the jury, judgment was rendered that he retain the possession of the same, and that he recover \$30 damages of the defendant, and costs.

From this judgment the defendant applied for and obtained this writ of error.

The following facts were agreed upon on the trial of said action: On the — day of —, 1882, the Andrew Kloman Steel and Iron Company owned what had theretofore been known as the "Ohio Valley Iron Works," consisting of about three acres of ground, situated on the bank of the Ohio River in Moundsville, West Virginia, upon which there was a large rolling-mill building and other buildings. On said date the said Andrew Kloman Steel and Iron Company was running and operating said rolling mill, and was the owner of two spike machines, consisting of two large pieces of machinery, weighing from fifty to sixty hundred weight; and the Andrew Kloman Steel and Iron Company had recently bought said rolling mill, and was fitting it up with a view to manufacturing muck iron, bar iron, and railroad spikes; and on the — day of —, 1882, the said Andrew Kloman Steel and Iron Company brought the said spike machines to Moundsville, West Virginia, to place them in said rolling mill as a part of the machinery of said rolling mill, to be run in connection with other machinery in the mill in the manufacture of railroad spikes. Said spike machines were brought new to Moundsville, West Virginia, and were brought on a car, and the car was run in upon a railroad switch belonging to said Andrew Kloman Steel and Iron Company, upon their said rolling-mill grounds, and one of the said spike machines was unloaded and the other was still on the car, but had been partially moved, and the foundation in said rolling mill had been prepared to receive said machines.

While in this condition, on the thirteenth day of May, 1882, said G. S. McFadden, who had brought suit against said Andrew Kloman Steel and Iron Company, caused an attachment to be levied upon said spike machines, as the personal property of the said Andrew Kloman Steel and Iron Company. After the levying of said attachment the said Andrew Kloman Steel and Iron Company proceeded at once to place said spike machines in said rolling mill upon the foundation prepared for them, and connected the said spike machines with the other machinery in said rolling mill with belts, and proceeded to manufacture railroad spikes; and the said spike machines were used the same as any other machinery in said rolling mill.

On the — day of —, 18—, said G. S. McFadden obtained a judgment against said Andrew Kloman Steel and Iron Company, and obtained an order of the court to sell said

spike machines, and they were sold on the twelfth day of March, 1884, at which sale said G. S. McFadden became the purchaser. At the time of said sale said spike machines were standing in said rolling mill where and as they had been placed as before stated; and that at the time said rolling-mill property was sold under a certain deed of trust to one J. D. Weeks, the said spike machines were still in the rolling mill as they had been placed as before described.

Said Joseph D. Weeks had sold said rolling-mill building, including all machinery therein belonging to him, to parties at Irongate, Virginia, who had sent hands to remove the same to that point; and James Crawford, the defendant in this suit, had the contract to remove said rolling mill, and had removed most of the mill and machinery, and had commenced to move these spike machines, and had removed one of them from its foundation, and was ready to remove the other, when the suit was brought against said James Crawford. Said G. S. McFadden, on the twenty-sixth day of April, 1886, at the time said rolling-mill property was being sold, informed said Joseph D. Weeks that he claimed said spike machines.

It also appears that the deed of trust executed by A. C. Kloman and others, dated May 1, 1882, was admitted to record on the thirteenth day of May, 1882, the same day on which said attachment was levied; and the language of said deed, after describing the lots, is as follows:—

“Also all the buildings, improvements, fixtures, appurtenances now or which shall hereafter be put upon the above-described lots and lands, or any part thereof, and all the machinery, engine, boilers, and tools pertaining to the works in operation or to be hereafter operated on said lots and lands, or any part thereof, including as well the machinery, engine, boilers, and tools now in use in connection with said works as those which shall hereafter be brought to and kept in or about the same for the purpose of the business carried on upon said lots and lands, or any part thereof.”

The right to the possession of said spike machines asserted by the plaintiff in this case he claims to have acquired by reason of his purchase at the sale under said order of attachment, and the defendant claims to be entitled to the possession of the same under a sale made under a decree of court to J. D. Weeks in enforcement of said deed of trust. The demurrer to the declaration was not insisted on by the plaintiff in error,

and as the declaration appears to be well enough, we must consider that it was interposed out of abundant caution.

The question, however, which meets and confronts us at the threshold of this case is whether the plaintiff, McFadden, by reason of the purchase made by him under the attachment sale, acquired any right or title to the possession of the property in question. He states in his own deposition that he bought said machines as personal property, and got no deed for them; and the question is whether property of this character, which has by law become a part of the real estate, can be levied on under an attachment, and sold as personalty, and the purchaser at such sale thereby acquire title to the possession of the property so sold.

It is not claimed in this case that the land on which said rolling mill was located, or any part of the same, was levied on under this attachment. If it had been levied on as realty, the statute prescribes how the levy should be made, to wit, "by an indorsement thereon, or upon a paper annexed thereto, stating, as near as may be, the quantity or the supposed quantity and the location thereof." And although none of the attachment proceedings were offered in evidence, it does appear affirmatively that said machines were levied upon and sold as personal property, and that they were purchased by the plaintiff, G. S. McFadden, as such; that no deed was executed to said McFadden therefor, and that possession was never delivered to him of said property, but on the contrary, that said spike machines were levied upon on the thirteenth day of May, 1882, under the attachment sued out by said McFadden, but that the Andrew Kloman Steel and Iron Company retained possession of the same, and placed them in said rolling mill, upon the foundation prepared for them, and connected them with the other machinery in said rolling mill by belts, and proceeded to manufacture railroad spikes; and that although they were sold under an order made in said attachment suit on the twelfth day of March, 1884, and purchased by said McFadden as personal property, they were allowed to remain in said rolling mill in the possession of said steel and iron company, and that they so remained until the twenty-sixth day of April, 1886, when the same were sold to J. D. Weeks under the decree enforcing said trust deed, and that they were yet in the rolling mill at the time said action of detinue was instituted on the thirty-first day of August, 1889.

This we must regard as a long acquiescence on the part of

said McFadden in the action of said company in taking and retaining the possession of said property, and even if it could have been properly regarded as personal property, said McFadden, by consenting to the same remaining in possession of said company for such a length of time, thereby released his lien.

This property, however, at the time of the levy of said attachment was clearly a part of the realty. In the case of *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789, points 1 and 2 of *syllabus*, this court held,—

“1. The true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is that where the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and pass with the building, and whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.

“2. If an engine and boiler have been bought by the owner of a mill, and hauled upon his grounds into the mill yard, with the *bona fide* intention of attaching them to the mill, although not yet actually attached thereto, and they are necessary for the purposes for which they are to be used, they must be regarded as a part of the realty, and not liable to the levy of an execution as personal property.”

The rule laid down by the court of appeals of Virginia is found in the case of *Green v. Phillips*, 26 Gratt. 752, 21 Am. Rep. 323, where it was held: “The true rule of determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer is, that where the machinery is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.”

In that case executions had been levied upon certain machinery belonging to the Harrisonburg Lumber and Merchandise Company, to wit, upon a steam-engine, which drove the machinery; also upon a molding machine and two planing

machines; and they were held in an injunction suit to restrain the sale to be part of the realty.

In *Ewell on Fixtures*, p. 19, the author says: "Salt pans have been held to pass with the realty and to belong to the inheritance because adapted and designed for and incident to an establishment for the manufacture of salt. The principle is that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character, and appertain to the realty as an incident or accessory to its principal. Upon this ground we are satisfied that the claim in question, being in the mill at the time and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim independent of any reference as to usage."

The principal last above laid down in said case was approved in *Voorhis v. Freeman*, 2 Watts. & S. 116, 37 Am. Dec. 490. This was a case of a sale under *levari facias* on a mortgage of "a lot or piece of ground with one iron rolling-mill establishment situate thereon, with the buildings, apparatus, steam-engine, etc., attached to said establishment; and the question arose between the vendee under said sale and subsequent execution vendee under a judgment against a former owner of the mill of the articles in question as chattels, which were iron rolls of different shapes and sizes, part of the machinery of said rolling mill, part of which were duplicates, but were necessary and proper for an emergency to replace broken ones, and all of which had at one time or another been in actual use in said mill—the question was simply whether such rolls were real or personal property, and it was held that the rolls in question passed as part of the freehold; but even if they had not passed, they could not have been sold as chattels on *levari facias*."

Now, in the case under consideration the plaintiff's right to the possession of the spike machines rested solely upon the question, whether or not under said attachment sale he became the owner of the same, for the reason that he asserted no other claim to the possession than that which follows as a consequence from the ownership; and in order that he should succeed in the case, it was incumbent on him to show that by reason of said attachment proceedings and the sale thereunder he acquired the ownership of said machines. These machines, under the authorities we have cited, must be considered to have been a part of the realty at the time of the levy of said

attachment; and before they could have been sold under said attachment there must have been a proper levy on the same.

Section 7, chapter 151, of the code of 1849 reads as follows: "Every such attachment (except where it is sued out specially against specified property) may be levied upon any estate, real or personal, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues. It shall be sufficiently levied in every case by a service of a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer, to be in possession of effects, or be indebted to the defendant, and as to real estate, by such estate being mentioned and described by indorsement on such attachment."

And in a proceeding under that statute it was held, in the case of *Clark v. Ward*, 12 Gratt. 440, point 4 of *syllabus*, "the indorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate."

The statute which was in force at the time said attachment was sued out and levied by the plaintiff, McFadden, on said machines provides: "If the same" (meaning the attachment) "be levied upon real estate, it shall be sufficiently served by an indorsement thereon, or upon a paper annexed thereto, stating, as near as may be, the quantity, or the supposed quantity, and the location thereof"; and as we have seen in the case of *Clark v. Ward*, 12 Gratt. 440, under a statute almost identical in its provisions, the indorsement on the attachment not mentioning or describing the real estate does not operate upon such estate.

It is not even pretended in this case that the attachment was indorsed as required by statute to constitute a lien upon real estate, but on the contrary, it appears affirmatively by the testimony of the plaintiff himself that the spike machines in controversy were levied on and sold as personalty. Stephens's Pleading, p. 15, says: "The action of detinue lies where a party claims the specific recovery of goods and chattels or deeds and writings detained from him." The action does not lie for the recovery of real estate, and in order that the plaintiff should recover in this case it was not only necessary that he should show that he was entitled to the possession of the property claimed in his declaration, but also that said property is personalty, or goods and chattels, as therein described; but as we have seen from the authorities above referred to,

said machines must [be] regarded as a part of the realty, and the action of detinue would not lie for their recovery.

The plaintiff asked the court to give the jury the following instruction: "The court instructs the jury that if they find from the evidence that the two railroad spike machines mentioned in plaintiff's declaration were at the time this suit was brought the property of the plaintiff, and that he was entitled to the possession of the same when this suit was brought, and that the defendant, James Crawford, took possession of said machines, and was in possession thereof when this suit was brought, against the consent of the plaintiff, then he unlawfully detained the same, and you should find for the plaintiff."

To the giving of said instruction the defendant, by his attorneys, objected, which objection was overruled, and the court gave said instruction to the jury, and the defendant excepted, and this action of the court is assigned as error.

I think said exception was well taken for the reason that it was calculated to mislead the jury as to the law of the case. The evidence showing that the machines, when levied upon, were part of the realty, it was improper to instruct them that the plaintiff was entitled to a verdict for them in an action of detinue; but I am of opinion that the court committed no error in refusing the following instruction, asked for by the defendant, and which is assigned as error:—

"The jury are instructed that if they find from the evidence that the spike machines in question were subject to the lien of an attachment of the plaintiff in the year 1882, as personal property, and that after said lien attached, the spike machines were placed upon a foundation prepared for them in the Andrew Kloman Steel and Iron Company's mill by such company, and were attached to the machinery of the mill, and used by the company in the manufacture of railroad spikes, and that said machines remained in said mill until September, 1889, without demand being made for them by the plaintiff, and that the defendant, James Crawford, while acting for the owners of said rolling mill, attempted to remove said machines in September, 1889, and that the first demand was then made for said machines by the plaintiff, you must find for the defendant"—because it describes said machines as personal property, and the instruction speaks of the lien attaching, when the evidence in the cause shows that they were a part of the realty, and for that reason the instruction would have a tendency to mislead the jury.

The court, however, committed an error in refusing to set aside the verdict, and grant the defendant a new trial, for the reasons before stated. The court erred in fixing the damages at thirty dollars for reasons stated by this court in the case of *Unfried v. Baltimore etc. R. R. Co.*, 34 W. Va. 260.

For the reasons before stated the judgment complained of is reversed, the verdict set aside, and a new trial is awarded the defendant.

Reversed. Remanded. —

FIXTURES — MACHINERY, WHEN BECOMES: See extended note to *Pierce v. George*, 11 Am. Rep. 314; *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 15 Col. 29; 22 Am. St. Rep. 373, and note; *Vail v. Weaver*, 132 Pa. St. 363; 19 Am. St. Rep. 598, and note; *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 409, and note; *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368, and note; *Voorhis v. Freeman*, 2 Watts & S. 116; 37 Am. Dec. 490, and note.

REPLEVIN FOR THE RECOVERY OF FIXTURES will not lie: *Cresson v. Stout*, 17 John. 116; 8 Am. Dec. 373.

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ACCESSARIES.

1. CONSPIRACY TO RESIST ARREST—COMMON DESIGN NECESSARY TO CONSTITUTE. — When one of two persons resisting arrest shoots an officer in the presence of the other, the latter will not be liable for the shooting, in the absence of a common design between them to resist arrest, although the party not shooting may have an intent to resist arrest without reference to the intent of the other party. *White v. People*, 196.
2. CONSPIRACY TO RESIST ARREST—AIDING AND ABETTING BY SIGNS AND MOTIONS. — When one of two persons resisting arrest aids, abets, advises, or encourages the other by signs or motions to assault the arresting officer, he is guilty of such assault the same as if made by him personally. *White v. People*, 196.
3. CONSPIRACY WITH INTENT TO KILL — COMMON DESIGN NECESSARY TO CONSTITUTE. — The mere presence of a party at an assault with intent to kill is not sufficient to constitute him a principal, unless there is something in his conduct showing a common design to encourage, incite, or in some manner aid, abet, or assist the assault. Aiding, abetting, or assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor. *White v. People*, 196.

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ANIMALS.

1. KILLING AS DISEASED WHEN NOT DISEASED IN FACT.—In an action of trespass for breaking plaintiff's close and killing his horses and destroying his harness, a special plea by the defendants that it came to the knowledge of such of them as were the board of live-stock commissioners of the state of Illinois, that there was reasonable ground for belief that the horses of the plaintiff, kept in his close, were diseased with a dangerous, contagious, and infectious disease called "glanders," and that they, as such board, caused an examination and investigation to be made, and upon such examination and investigation found and decided three of the horses to be diseased and disordered with said disease, and one of the horses to have been exposed to infection from such disease, and the harness to be poisoned with such infection, and ordered and directed the other defendants to slaughter and kill said horses, etc., is bad on demurrer. It is the fact that domestic animals are actually stricken

with contagious and infectious diseases, or have been exposed to infection therefrom, that gives to the live-stock commissioners the power to slaughter such animals, and unless such fact exists the slaughter thereof is without authority of law; and is no justification for such slaughter that the commissioners acted in good faith, that they were reasonable grounds for the belief that some of the horse slaughtered were diseased with glanders and that others of them had been exposed to that contagion, and that they made an honest and careful investigation, to the best of their ability, and, as a result thereof, decided and determined that some of said horses were so diseased and that others of them had been so exposed. *Pearson v. Zehr*, 113.

2. VALUABLE DOG, KILLING OF, NOT JUSTIFIED, WHEN. — The law does not justify one in killing his neighbor's valuable dog because the animal has left tracks on his freshly painted porch, has been found on one occasion in his henhouse, and has come around his house at night, chased cats into the trees, and barked. *Bowers v. Horen*, 513.
 3. VALUE OF DOG, TESTIMONY ADMISSIBLE TO PROVE. — In an action to recover damages for the killing of a shepherd dog, chiefly valuable for his ability to herd cattle and horses, farmers who know the characteristics and qualities of the dog, and the value of such an animal to a farmer who keeps stock, may testify as to his value. *Bowers v. Horen*, 513.
- See DAMAGES, 3; EVIDENCE, 7; EXECUTION, 9; RAILROADS, 31; STATUTES, 8; WITNESSES, 2.

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APPEAL.

1. FORM OF ASSIGNMENT OF ERROR. — An assignment of error on the part of the trial court in excluding evidence of a material fact need not name the witnesses nor the questions asked them. It is sufficient if it specifies the fact and states wherein the court erred. *Union Building Ass'n v. Rockford Ins. Co.*, 323.
2. APPELLEES CANNOT ASSIGN ERRORS. — ON AN APPEAL from a judgment the amount thereof will not be reviewed or altered at the request of the appellee. *Schlaunig v. De Peyster*, 308.
3. ASSIGNMENT OF ERROR, WHEN WAIVED. — An objection that no assignment of errors has been made and filed on appeal, not raised until after argument in the appellate court, and then without notice to the opposing counsel, comes too late and must be deemed to have been waived. *Smith v. Hill*, 329.
4. EVIDENCE, ADMISSION OF, NOT PREJUDICIAL, WHEN. — Where the declaration in an action for negligence claims damages for an injury to the plaintiff's leg, it is not prejudicial error for the court to permit the plaintiff to be asked if there is anything on his hip which indicates the force of the blow, when, upon objection being raised, his counsel states that the testimony is offered to show the force of the blow, and that he wants the court to instruct the jury that they cannot give any damages for an injury to the hip. *Palmer v. Michigan etc. R. R. Co.*, 507.
5. EVIDENCE THAT CASE IS BEING PROSECUTED ON PERCENTAGE NOT ADMISSIBLE. — It is not error for the trial court to exclude testimony to show whether or not the plaintiff's attorney in an action for negligence has taken the case to prosecute on a percentage, and whether or not he is

- bearing the expenses of the litigation. *Palmer v. Michigan etc. R. R. Co.*, 507.
6. **IMPROPER CROSS-EXAMINATION — HARMLESS ERROR.** — An improper cross-examination of a person accused of crime, from which no prejudice or harm could possibly result, is not reversible error. *State v. Houz*, 686.
7. **JURY TRIAL — IMPROPER REMARKS OF COUNSEL NOT GROUND FOR REVERSAL, WHEN.** — Improper remarks made by the state's attorney in his closing address in a criminal trial cannot injure the defendant, and are not, therefore, ground for reversal of the judgment, where, upon the defendant's objecting to such remarks, the court directs the counsel to confine his remarks to the record, and charges the jury that it is their duty to give no consideration whatever to such remarks and that the same are withdrawn from them as not being proper for their consideration. While it is the duty of the trial judge to see that the line of argument is kept within reasonable bounds, and not to allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial, at the same time unreasonable restrictions must not be placed upon a legitimate presentation of the evidence, and comment upon testimony and the statement of fair inferences from proven facts come within the province of a just and lawful prosecution. *Palmer v. People*, 146.
8. **CONFLICTING INSTRUCTIONS, REVERSIBLE ERROR TO GIVE.** — It is reversible error to give conflicting instructions, no matter at whose instance they are given. *Bluedorn v. Missouri Pac. R'y Co.*, 615.
9. **DISMISSAL OF APPEAL.** — The appellate court will not of its own motion dismiss an appeal for failure to file an assignment of errors when the record contains but a single question. *Smith v. Hill*, 329.
- See **FORGERY**, 8; **JUDGMENTS**, 14; **LEGISLATURE**; **LIMITATIONS OF ACTIONS**, 1; **MORTGAGES**, 8; **NUISANCE**, 1; **PLEADING**, 2, 4; **RAILROADS**, 33; **RAPE**, 4; **TRIAL**, 1.

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1. IF A STATUTE REQUIRES THE LEVY OF AN ATTACHMENT UPON REAL ESTATE to be indorsed upon the writ, stating as nearly as may be, the quantity and location thereof, a levy upon fixtures which are a part of the realty, not followed by such indorsement, is void. *McFadden v. Crawford*, 894.
2. FIXTURES — UNATTACHED MACHINERY. — Spike machines, weighing two and a half tons, intended to be placed and permanently used in a rolling mill, one of which was on the cars by the side of the mill and the other unloaded, the foundations of both being all prepared in the mill, are parts of the realty, and cannot be levied upon and sold as personal property. If so levied upon and sold, the purchaser acquires no title thereto. *McFadden v. Crawford*, 894.

See SHIPPING, 4.

ATTORNEY AND CLIENT.

1. INFORMATION ACQUIRED DURING EMPLOYMENT CANNOT BE USED BY ATTORNEY. — The relation of attorney and client is based and founded upon trust and confidence, and information acquired concerning the subject-matter of the employment whilst the relation exists cannot be thereafter used by the attorney against the client. *Eoff v. Irvine*, 609.
2. ATTORNEY PURCHASING OUTSTANDING TITLE TO CLIENT'S LAND HOLDS AS TRUSTEE. — An attorney who has been consulted about a title to land will not be permitted to purchase an outstanding one, and then set it up in opposition to his client; and if he does purchase such outstanding title he holds it in trust for his client, if the latter sees fit to claim the benefit of the purchase; nor does it make any difference that the attorney has withdrawn from his client's employment before he makes the purchase. *Eoff v. Irvine*, 609.

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1. ACCEPTANCE OF CHECK MAKES BANK DEBTOR OF DEPOSITOR, WHEN. — When a check is offered as a deposit to the bank on which it is drawn, and is received as such, the check being genuine, in the absence of fraud, the bank becomes the debtor of the depositor, the title to the deposit passes to the bank, and the transaction is conclusive and executed between the parties, and this whether the books of the bank are correctly kept or not. *American etc. Nat. Bank v. Gregg*, 171.

2. **CERTIFICATION OF CHECK, WHEN RELEASES DRAWER.** — If a drawer in his own behalf or for his own benefit gets his check certified and then delivers it to the payee, the payer is not discharged, but if the payee or holder in his own behalf gets it certified instead of getting it paid, then the drawer is discharged. *Minot v. Russ*, 472.
3. **BANK'S OBLIGATION TO PAY CHECK DEPENDS ON ACTUAL STATE OF DRAWER'S ACCOUNT.** — The obligation of a bank to pay a check drawn upon it, or its right to refuse payment thereof, depends upon the actual state of the drawer's bank account at the time of its presentment, and not upon what the bank books may then show. — *American etc. Nat. Bank v. Gregg*, 171.
4. **CHECK, WHAT AMOUNTS TO PAYMENT OF.** — Where a bank receives a check drawn on it, stamps it as paid, and enters the amount thereof to the credit of the holder presenting it, this amounts to a payment of the check, although the bank may fail to charge the account of the drawer on its books with the amount; and after such payment the bank has no right to charge back the amount of the check to the account of the depositor without his consent. *American etc. Nat. Bank v. Gregg*, 171.
5. **DAMAGES FOR WRONGFULLY REFUSING TO PAY CHECK.** — When a banker refuses to pay the check of a person engaged in trade, who has sufficient funds on deposit for that purpose, he is entitled to substantial damages without proof of malice or special injury to the depositor. *Schaffner v. Ehrman*, 192.

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BEQUESTS.

1. **WILLS — CONSTRUCTION OF CHARITABLE BEQUEST — INDEFINITENESS.** — When by the residuary clause of a will covering personal property the testator directs his trustees named in the will "to pay over the whole residue and remainder of his means and estate to some Presbyterian institution in Baltimore, as they may determine, for charitable or religious purposes," the bequest is void for indefiniteness as to the institution intended to be promoted or benefited and the purposes to which the fund is to be applied. *Gambell v. Trippe*, 388.
2. **WILLS — CHARITABLE BEQUEST — WHEN LAPSES.** — When by the residuary clause of a will the testator directs his trustees named in the will "to pay over the residue and remainder of his means and estate to some Presbyterian institution in Baltimore, as they may determine, for charitable or religious purposes," the power of selecting a beneficiary given to the trustees by the will is one limited to the persons named. Upon their death without exercising it, it devolves upon no one else. The bequest thus sought to be made then lapses, and the testator's next of kin are entitled to receive it. *Gambell v. Trippe*, 386.

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1. **ADJOINING OWNERS NOT BOUND BY MISTAKEN LINE, WHEN.** — Where lands are divided by a fence which their owners suppose to be the true line, each claiming only to the true line wherever that may be, they are not bound by the supposed line and must conform to the true line when it is ascertained. *Battner v. Baker*, 606.
2. **STREETS, ESTOPPEL TO DENY EXISTENCE OF.** — A CONVEYANCE OF LAND DESIGNATED AS BOUNDED ON A STREET, the plan of which is referred to, gives the grantee a right by way of estoppel over the entire length of the land designated as a street if it belongs to the grantor, but does not obligate him to build and maintain a street fit for travel. *Durkin v. Cobleigh*, 436.

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CARRIERS.

1. **CARRIER OF LIVE-STOCK UNDER SPECIAL CONTRACT — INSUFFICIENT EVIDENCE TO JUSTIFY RECOVERY.** — When live-stock is transported under a special contract limiting the carrier's liability, and wherein the owner undertakes to go with and care for the stock during transportation, he cannot recover solely upon evidence of a failure to deliver; but he must also show that such failure was not due to his own negligence, but to a breach of duty on the part of the carrier. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.
2. **CARRIER OF LIVE-STOCK UNDER SPECIAL CONTRACT — BURDEN OF PROOF.** — When live-stock is shipped under special contract limiting the carrier's liability, and wherein the owner undertakes to go with and care for the stock during transportation, the burden of proof is on him to show, in the first instance, that the injury or loss complained of is not attributable to a failure to perform, or a negligent or improper performance of the acts which he undertook to perform, and he must also show that the injury was caused by the carrier's breach of duty under the contract. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.
3. **CARRIER OF GOODS UNDER SPECIAL CONTRACT — LIABILITY — BURDEN OF PROOF.** — When a carrier has exclusive control of goods carried under a special contract limiting his liability, the shipper may make out his case by proving his contract and the non-delivery of the goods. The burden of proof is then upon the carrier to show that the injury or loss complained of is attributable to one of the causes or perils against which the contract secures immunity. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.
4. **POWER TO LIMIT LIABILITY BY SPECIAL CONTRACT — BURDEN OF PROOF.** While a carrier cannot contract for exemption from his own fraud or negligence, he may, by special contract, limit his common-law liability, and when so limited there can be no recovery for loss or injury caused by one of the perils from which the contract effectively exempts him. The burden of proof is upon him to establish such exemption. *Terre Haute R. R. Co. v. Sherwood*, 239.
5. **DUTY TO PROTECT PASSENGERS.** — A common carrier is obliged to protect his passengers from violence and insult from whatever source arising. While he is not regarded as an insurer of his passengers' safety against every possible source of danger, yet he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make their journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. *Richmond etc. R. R. Co. v. Jefferson*, 87.

See LEGISLATURE; RAILROADS, 4, 11.

CASHIER.

See CORPORATIONS, 21; JUDGMENTS, 15.

CERTIFICATE.

See BANKS, 2; CORPORATIONS, 11; OFFICERS, 4.

CERTIFICATE OF DEPOSIT.

See NEGOTIABLE INSTRUMENTS, 8.

CHANGE OF INTEREST.

See **INSURANCE**, 3, 6.

CHANGE OF VENUE.

See **JUSTICE OF THE PEACE**, 2.

CHARITIES.

See **BEQUESTS**.

CHARTERER.

See **SHIPPING**, 5, 7, 8.

CHARTER PARTY.

See **SHIPPING**, 7, 8.

CHARTERS.

See **CORPORATIONS**, 3; **MUNICIPAL CORPORATIONS**, 2, 13.

CHECKS.

BANKING. — A CHECK is an order to pay the holder a sum of money at a bank on the presentation of the check or demand of the money; no further notice is necessary; no acceptance is required or expected, and it has no days of grace. *Minot v. Russ*, 472.

See **BANKS**; **FORGERY**, 6.

CHURCHES.

See **MUNICIPAL CORPORATIONS**, 15.

CIRCUS.

See **RAILROADS**, 12.

CLERKS OF COURT.

See **JUDGMENTS**, 27.

COLLATERAL ATTACK.

See **JUDGMENTS**, 12; **JUSTICE OF THE PEACE**.

COLLATERAL SECURITY.

See **DAMAGES**, 6; **PLEDGE**.

COLLECTION.

See **NEGOTIABLE INSTRUMENTS**, 10, 11, 16.

COMMISSIONERS.

See **ANIMALS**, 1; **DAMAGES**, 3; **LEGISLATURE**; **RAILROADS**, 4; **STATUTES**, 8-10.

COMMON CARRIERS.

See **CARRIERS**.

COMPENSATION.

See **CORPORATIONS**, 18; **DAMAGES**, 3, 4; **MUNICIPAL CORPORATIONS**, 13.

CONDITIONS.

See DEEDS, 2, 3, 5; EJECTMENT; INSURANCE, 4, 6, 11, 12; MORTGAGES, 5; VENDOR AND PURCHASER, 1.

CONFESSION AND AVOIDANCE.

See INSURANCE, 15.

CONFESSION OF JUDGMENT.

See JUDGMENTS, 21-27.

CONFLICT OF LAWS.

See CRIMINAL LAW; EVIDENCE, 1; NEGOTIABLE INSTRUMENTS, 12-15.

CONSIDERATION.

See ACTIONS; CONTRACTS, 3, 5; EQUITY, 3; ESTOPPEL, 1; EXECUTION, 2-6; FRAUDULENT CONVEYANCES; NEGOTIABLE INSTRUMENTS, 5; SPECIFIC PERFORMANCE.

CONSPIRACY.

CRIMINAL CONSPIRACY — WHAT CONSTITUTES. — When two persons have a common design to do an unlawful act, whatever act one of them does in furtherance of the common design is the act of both, for which both are equally guilty. *White v. People*, 196.

See ACCESSARIES.

CONSTABLES.

See HOMICIDE, 1-5.

CONSTITUTIONS.

1. **CONSTITUTIONAL LAW — NATIONAL CONSTITUTION, WHEN DOES NOT CONTROL PROCEEDINGS IN STATE COURTS.** — The provisions of section 2 of article 3 of the constitution of the United States declaring that the trial of crimes shall be held in the state where they shall have been committed, and of the Sixth Amendment guaranteeing that in all criminal prosecutions the accused shall enjoy the right to trial by impartial jury of the state and district wherein the crimes shall have been committed, apply only to proceedings in the courts of the United States for offenses against the United States. *Ex parte McNeely*, 831.
2. **CONSTITUTIONAL LAW — STATUTE AUTHORIZING THE PUNISHMENT OF A CRIME COMMITTED BEYOND THE STATE.** — A statute declaring that if any person is struck or poisoned out of this state and dies by reason thereof within this state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or the poison administered, in the county in which the person so struck or poisoned may die, is not unconstitutional, though the constitution of the state declares that the trial of crimes shall be in the county where the alleged offense was committed. *Ex parte McNeely*, 831.
3. **CONSTITUTIONAL LAW — PRIVATE PAPERS PROTECTED FROM SEIZURE.** — The constitutional provision "that no person shall be compelled to testify against himself in a criminal cause," precludes the seizure of one's private books and papers in order to obtain evidence against him. *State v. Davis*, 640.

4. PRESCRIPTIONS REQUIRED TO BE KEPT BY DRUGGISTS NOT PRIVATE PAPERS.

The prescriptions required by section 4622 of the Revised Statutes of 1889, of Missouri, to be kept by druggists and produced before courts or grand juries, are not private papers of the druggists, and the law imposing the duty of preserving and producing them is not unconstitutional. *State v. Davis*, 640.

CONSTITUTIONAL LAW.

See CONSTITUTIONS; CORPORATIONS, 11; ELECTIONS, 1, 2, 6; STATUTES, 8.

CONSTRUCTION.

See ELECTIONS, 3, 4; EMINENT DOMAIN, 1, 2; SHIPPING, 7; STATUTES; WILLS 1-4.

CONTRACTORS.

See NEGLIGENCE, 6, 10, 13.

CONTRACTS.

1. **PLEADING SPECIAL CONTRACT.**—When a party declares upon a special contract he must state facts showing an actionable breach of that contract. He cannot recover upon any contract except that upon which he specially declares. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.

2. **A CONTRACT TO BREAK THE LAWS OF A FOREIGN COUNTRY IS INVALID.** Therefore a sale of property which the purchaser contemplates is to be resold contrary to the laws of a neighboring state, and which requires an act on the part of the seller in furtherance of such scheme, is invalid. *Graves v. Johnson*, 446.

3. **RESTRAINT OF TRADE.**—Although agreements in general restraint of trade are void as against public policy and as creating monopolies, yet an agreement in partial restraint of trade will be upheld when the restriction does not go beyond some particular locality, is founded upon sufficient consideration, and is limited as to time, place, and person. *Chapin v. Brown*, 297.

4. **RESTRAINT OF TRADE.**—One engaged in business may sell his stock in trade and good-will, and make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. *Chapin v. Brown*, 297.

5. **RESTRAINT OF TRADE—CONSIDERATION—PUBLIC POLICY.**—An agreement entered into by all the grocers of a certain town by which they agree in favor of a third person, and without receiving any money or other consideration, to quit the business of buying and selling butter for two years, and such third person agrees to carry on that business exclusively for the same period of time, is void for want of consideration, and is also against public policy as creating a monopoly and destroying competition. *Chapin v. Brown*, 297.

See CARRIERS, 14; CORPORATIONS, 1, 13; EVIDENCE, 2, 8; INSURANCE, 1, 8; 9; JUDGMENTS, 2, 4, 5; LANDLORD AND TENANT, 1; NEGLIGENCE, 6; NEGOTIABLE INSTRUMENTS, 14, 15; RAILROADS, 5, 12, 29; SALES; SHIPPING, 3, 6, 7; SPECIFIC PERFORMANCE; SUBROGATION, 1; TELEGRAPHS, 3; VENDOR AND PURCHASER, 3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 4, 16-24; RAILROADS, 17, 18, 27, 28, 40-42, 61, 62.

CONVERSION.

See CORPORATIONS, 9, 12; DAMAGES, 6; PLEDGE, 2; TROVER, 3-5.

CONVEYANCES.

See COVENANTS; DEEDS; DEVISE, 2; ESTOPPEL, 1; EQUITY, 12; EVIDENCE, 3, 8; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 4; INSOLVENCY, 1; JUDGMENTS, 1; MORTGAGES; VENDOR AND PURCHASER.

CORPORATIONS.

1. BY-LAWS, CONSTRUCTION OF. — A by-law of a news association prohibiting a member from receiving or publishing the regular news dispatches of any other news association covering like territory and organized for a like purpose, prohibits such member from receiving or publishing dispatches of any other news association whatever, if the association so adopting the by-law does not confine its business to any part of the world, and either by agents or through contracts supplies its members with news from all over the world. *Matthews v. Associated Press*, 741.
2. NEWS ASSOCIATION — RESTRICTIVE BY-LAW, WHAT REASONABLE. — A by-law of a news association prohibiting its members from receiving or publishing the dispatches of any other news association covering the same territory and organized for the same purpose is not unreasonable, nor void as in restraint of trade, and may be enforced. *Matthews v. Associated Press*, 741.
3. LIEN UPON STOCK. — At common law, no lien exists in favor of a corporation upon the stock of any share holder to satisfy or secure a debt due by him to the company; and unless such lien is created by statute, by charter, or by usage brought to the knowledge of and acted on by both parties, it does not exist at all. When the corporation has no such lien, it cannot resist or prevent a transfer of the stock by any shareholder to some one else. *Gemmell v. Davis*, 412.
4. PLEDGE OF STOCK BY PRESIDENT. — When the president of a corporation pledges his individual stock therein, while not engaged in its business and not acting in his capacity as president and without making a transfer thereof on the books of the company, his knowledge of the transaction is not binding on the corporation. *Gemmell v. Davis*, 412.
5. PLEDGE OF STOCK — RIGHTS OF PLEDGEE. — When the papers relating to a pledge of corporate stock fail to show the debt for which the stock is pledged, the statement of the specific debt it was pledged to secure contained in a subsequent assignment of the same stock by the pledgor to a third party, is merely *ex parte* and cannot impair the rights of the original pledgee. *Gemmell v. Davis*, 412.
6. LIEN ON STOCK. — A PLEDGEE who fails and neglects to notify the corporation that he holds its stock in pledge, or to take the proper steps to secure title to the stock in his own name, will not be protected against the lien of the corporation upon the stock to secure the payment of an indebtedness contracted to the company by the pledgor in the meantime and subsequently to the pledge of the shares. *Gemmell v. Davis*, 412.
7. DIVIDENDS, PAYMENT OF, TO PLEDGOR. — While dividends declared during the pledge of corporate stock belong to the pledgee although he is

not registered as owner on the corporate books, yet if not so registered and the corporation pays the dividend in good faith and without notice of the transfer to the pledgor, the payment is a good one as against the corporation. *Gemmell v. Davis*, 412.

8. **DIVIDENDS, WHO ENTITLED TO.** — As between the vendor and vendee or the pledgor and pledgee of shares of corporate stock, all dividends declared after the sale or pledge of the stock belong to the vendee or pledgee, even though the transfer has not been recorded on the books of the corporation. *Gemmell v. Davis*, 412.
9. **THE WRONGFUL AND IRREGULAR SALE OF THE STOCK** of a stockholder made by a corporation is a conversion by it of such stock for which an action can be sustained against it by the owner, though if he had elected to do so, he might have treated such levy as invalid, and, by paying the dues for which the stock was irregularly sold, have reinstated himself as a stockholder as completely as if the pretended sale had not been made. *Allen v. American Building etc. Ass'n*, 574.
10. **TRANSFER OF STOCK.** — As between vendor and vendee or pledgor and pledgee of stock, a transfer on the books of the corporation is not essential to perfect an equitable title in the vendee or pledgee. *Gemmell v. Davis*, 412.
11. **STOCK OF CORPORATION, TRANSFER OF, BY TRANSFER OF CERTIFICATE, VALIDITY OF.** — A by-law of a corporation which prohibits the transfer of the stock of the corporation, except by a formal transfer on its books, does not, in the absence of a constitutional or statutory prohibition, render invalid a transfer of its stock by a transfer of the certificate thereof; and such a transfer is good against an execution creditor of the stockholder who did not have notice of the transfer when the execution was levied, but was notified of it before he purchased the stock, at a sale under the execution. *Wilson v. St. Louis etc. R'y Co.*, 624.
12. **STOCK, IRREGULAR SALE OF, WHEN NOT RATIFIED.** — The receipt by stockholders of the surplus resulting from an irregular and invalid sale of their stock made by the corporation, does not ratify such sale and estop them from maintaining an action for conversion, if at the time of such receipt, they did not know that the sale had been conducted irregularly and with such failure to observe the by-laws and rules of law upon the subject that it was invalid. The stockholders, if they had no notice of any irregularities, were not under obligation, before accepting the surplus proceeds, to investigate the proceedings culminating in the alleged sale, to ascertain whether they were regular and valid. They had the right to act on the presumption that the corporation and its officers had properly performed their duties. Nor were the stockholders bound to return the sums received before commencing action against the corporation for the conversion of their stock. *Allen v. American Building etc. Ass'n*, 574.
13. **SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION IS NOT A CONTRACT** for the want of a contracting party on the other side, but may become such on the organization of the contemplated corporation. At any time prior to such organization such subscription is a mere offer, and may be withdrawn by the signer. *Hudson Real Estate Co. v. Tower*, 434.
14. **MOTION FOR EXECUTION AGAINST STOCKHOLDER OF INSOLVENT CORPORATION, INDEPENDENT PROCEEDING.** — A motion for execution against a stockholder of an insolvent corporation is an independent and original pro-

- ceeding of which notice, proper in form and substance and served within the proper jurisdiction, must be given to the person sought to be charged. *Wilson v. St. Louis etc. R'y Co*, 624.
15. STOCKHOLDER NOT PARTY TO JUDGMENT AGAINST CORPORATION. — A stockholder is not, in any sense, a party to a judgment rendered against a corporation of which he is a member, nor does such judgment bind his individual property. *Wilson v. St. Louis etc. R'y Co.*, 624.
 16. RIGHT TO SET OFF DIVIDEND AGAINST DEBT OF SHAREHOLDER, WHEN EXTINGUISHED. — When corporate stock has passed into the hand of a third person before a dividend has been declared, the right of the corporation to set off such dividend against the debt of the original shareholder is lost, for the reason that dividends declared after such transfer of the stock belong to the assignee and not to the assignor. *Gemmell v. Davis*, 412.
 17. RIGHT TO SET OFF DIVIDEND AGAINST DEBT OF STOCKHOLDER. — A corporation may withhold a dividend and set it off against a debt due by a shareholder to it. In order to do this the dividend must be payable to the person from whom the debt to the corporation is demandable. *Gemmell v. Davis*, 412.
 18. OFFICER DE FACTO — WHO IS NOT — SALARY. — When the board of directors of a corporation which is neither a *de jure* nor a *de facto* board appoints one of their number president of the corporation, he is neither a *de jure* nor a *de facto* officer, and is not entitled to recover any compensation for his services as such president. *Waterman v. Chicago etc. R. R. Co.*, 228.
 19. OFFICER DE FACTO, WHO IS NOT. — When a board of directors of a railroad corporation which is neither a *de jure* nor a *de facto* board, because elected at a time and place other than that fixed by the by-laws, without notice to or the presence of a minority of the *de jure* directors, and without the possession of the records, papers, or seal of the corporation, and whose right of office has been disputed as having no possession of the corporate property or of its management, and against whom litigation exists, to oust them from office, appoints one of their number president of the corporation, such appointee is neither a *de jure* nor a *de facto* officer, notwithstanding a majority of the directors present at the meeting were the *de jure* directors of the corporation holding over after the expiration of their term of office. *Waterman v. Chicago etc. R. R. Co.*, 228.
 20. EFFECT OF IRREGULAR MEETING OF DIRECTORS. — The presence of a bare majority or quorum of the lawful directors of a corporation at a special meeting, held at a place other than that designated for regular meetings of the board, and without notification to or the presence of the remaining lawful directors, as required by the by-laws for a special meeting, does not render the act of such quorum effectual to bind the corporation and its stockholders. *Waterman v. Chicago etc. R. R. Co.*, 228.
 21. JURISDICTION OVER A FOREIGN CORPORATION cannot be obtained by service of process upon a person who is not its cashier, director, nor managing agent. *Taylor v. Granite State Provident Ass'n*, 749.
 22. THE MANAGING AGENT OF A FOREIGN CORPORATION upon whom service of process against it may be made must be some person invested by it with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who

acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it. The relation of attorney and client does not constitute the attorney the managing agent upon whom process against the client may be served. *Taylor v. Granite State Provident Ass'n*, 749.

23. CORPORATION, WHEN PARTY TO A SUIT, has, like every other party thereto notice of everything disclosed by the record; hence it has notice of an assignment of its corporate stock disclosed thereby. *Gemmell v. Davis*, 412.

See ELECTRIC LIGHT COMPANIES; EMINENT DOMAIN, 2; JUDGMENTS, 15; JURISDICTION, 5; PROCESS, 5; QUO WARRANTO; TELEGRAPHS, 3.

COSTS.

See JUDGMENTS, 26; NEGOTIABLE INSTRUMENTS, 16.

CO-TENANCY.

BOUNDARY-LINE TREES — RIGHT TO MAINTAIN. — When trees from thirty to sixty feet high on the boundary line between two tracts of land are used by the owner on the south as a fence by fastening wire thereto, and afford valuable protection from storm and wind to his buildings and stock, while they render a strip of land four or five rods wide, belonging to the owner on the north, unproductive, such adjoining owners are tenants in common as to the trees, and either may be restrained by injunction from cutting down or destroying them. *Musch v. Burkhardt*, 305.

See HUSBAND AND WIFE, 6.

COUNTIES.

See CRIMINAL LAW, 1; MUNICIPAL CORPORATIONS, 14.

COURTS.

See CONSTITUTIONS, 1, 4; CRIMINAL LAW, 1; DAMAGES, 1; HABEAS CORPUS; JUDGMENTS, 7-11; LEGISLATURE; LIMITATIONS OF ACTIONS, 3; PLEADING, 6; STATUTES, 7, 9.

COVENANTS.

RESTRICTIVE COVENANTS, WHEN WILL NOT BE ENFORCED. — If the purpose of restrictive covenants inserted in a conveyance is to make the locality a suitable one for residences, but owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can no longer be accomplished, no matter how rigidly the restriction is enforced, it is oppressive and inequitable to give effect to it, and equity will not enjoin its violation, though when there is no remedy at law the bill may be retained for the purpose of assessing damages. *Jackson v. Stevenson*, 476;

See DEBTOR AND CREDITOR.

CRIMINAL LAW.

1. CRIME, PLACE WHERE COMMITTED. — If a man is unlawfully struck or injured in one state or county, from which he dies in another, the courts of the former, in the absence of any controlling statute, are the only ones which can inquire into and punish his offense. *Ex parte McNeeley*, 831.

2. CONFLICT OF LAWS. — The criminal laws of a state have no force beyond its territorial limits. *Ex parte McNeeley*, 831.

See ACCESSARIES; APPEAL, 6, 7; CONSPIRACY; CONSTITUTIONS, 1-3; FORGERY; HOMICIDE; INDICTMENT; RAPE; ROBBERY; TRIAL, 1.

CROPS.

See EXECUTION, 1; REAL PROPERTY, 1.

CROSS-EXAMINATION.

See APPEAL, 6.

CROSSINGS.

See RAILROADS, 19, 22, 25.

CRUELTY.

See MARRIAGE AND DIVORCE, 1.

DAMAGES.

1. THE LAW AND THE LADY. — The courts of Georgia will never be found wanting in their respect and devotion to the fair women of that state. They will always regard them as incomparably the best and most desirable portion of the population, and will never be disposed to deny them the fullest protection in the enjoyment of their rights which the law properly administered can give without "stretching" legal principles too far, simply because there is a lady in the case. At the same time the courts must guard against that species of "incurable insanity" the natural tendency of which is to unduly favor the gentler sex as litigants. *Chattanooga etc. R. R. Co. v. Lyon*, 72.

2. EXEMPLARY DAMAGES CAN BE ALLOWED IN CASES OF NEGLIGENCE only when it is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness and recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Gross negligence is not confined to this extreme degree of negligence; therefore, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages. *Florida etc. R'y Co. v. Hirst*, 17.

3. EXEMPLARY DAMAGES ALLOWED FOR RECKLESS AND OPPRESSIVE TRESPASS, WHEN. — In an action against a state board of live-stock commissioners and their servants for slaughtering plaintiff's horses as glandered, when in fact they were not, where the evidence shows that the trespass was committed in a reckless, oppressive, or wanton manner, exemplary damages may be awarded. *Pearson v. Zehr*, 113.

4. MUNICIPAL CORPORATIONS — WRONGFUL APPROPRIATION OF LAND FOR STREET — DAMAGES. — When a city wrongfully takes possession and appropriates private land to street purposes, to the permanent injury of the owner, without making compensation, and he recognizes in his complaint for damages the right of the city to continue in the use of the property taken and to succeed to his title, his damages may be assessed upon the basis of the value of the property taken. In arriving at the amount of damages, the value of the property with the improvement

may be deducted from its value without the improvement. *Fort Wayne v. Hamilton*, 263.

5. **PROSPECTIVE DAMAGES FOR IMPAIRMENT OF EARNING CAPACITY OF MINOR ALLOWABLE.** — In an action by an infant four years of age for personal injuries, the jury may take into consideration his prospective loss of earnings after he shall have attained his majority, although he has never earned anything, and no one can tell with any certainty what his future earning capacity will be. *Rosenkranz v. Lindell R'y Co.*, 588.
 6. **MEASURE OF DAMAGES FOR THE CONVERSION OF COLLATERAL SECURITIES** by the holder thereof cannot exceed the value of the property so converted. *Griggs v. Day*, 704.
 7. **MEASURE OF AGAINST TENANT FOR FAILURE TO PAY TAXES.** — When a tenant agrees to pay all taxes assessed against the land in lieu of rent, his failure to pay such taxes, resulting in the sale of the land therefor, renders him liable in damages only for the amount of unpaid taxes, with interest thereon. *Fontaine v. Schulenburg etc. Lumber Co.*, 648.
 8. **MEASURE OF DAMAGES, INSTRUCTION AS TO, SUFFICIENTLY CLEAR, WHEN.** In an action by a minor for personal injuries, an instruction to the jury that if they found for the plaintiff they should "assess his damages at such a sum as they may believe, from the evidence, will be a fair compensation to him: 1. For any pain of body or mind; 2. For any loss of earnings after he shall have attained the age of twenty-one years; 3. For any physical disfigurement or deformity; 4. For any permanent injury to his body, other than disfigurement and deformity, which the plaintiff has sustained or will hereafter sustain by reason of said injuries and directly caused thereby," is not so wanting in clearness or perspicuity as to confuse or mislead the jury. *Rosenkranz v. Lindell R'y Co.* 588.
- See** ANIMALS, 3; APPEAL, 4; BANKS, 5; COVENANTS; ELECTRIC LIGHT COMPANIES; ELEVATORS, 3; EVIDENCE, 8; LANDLORD AND TENANT, 1; LIMITATIONS OF ACTIONS, 1; MUNICIPAL CORPORATIONS, 12; NEGLIGENCE, 4, 9, 10, 12, 22; RAILROADS, 2, 3, 7, 10, 21, 30, 40-43, 53; SHERIFFS, 1; TELEGRAPHS, 1, 2; TROVER, 1, 5.

DAYS OF GRACE.

See CHECKS.

DEADLY WEAPONS.

See HOMICIDE, 3, 4, 9.

DEBTOR AND CREDITOR.

NOVATION IS A TRANSACTION WHEREBY a debtor is discharged from liability to his original creditor by contracting a new obligation in favor of a new creditor by order of the original creditor. *Griggs v. Day*, 704.

See BANKS, 1; EXECUTION, 4 9; FRAUDULENT CONVEYANCES; INSOLVENCY; LIMITATIONS OF ACTIONS, 2; PLEDGE; TRUSTS, 3.

DEBTS.

See HOMESTEAD, 1; INSOLVENCY; TRUSTS, 2.

DEDICATION.

See MUNICIPAL CORPORATIONS, 1-4.

DEEDS.

1. **CONVEYANCE TO GRANTEE BY WRONG NAME.** — One who accepts a conveyance in which his name is not correctly stated or spelled, is deemed to have adopted that name for the purpose of acquiring and holding title to the property. *Blinn v. Chessman*, 536.
 2. **CONVEYANCES, CONDITIONS IN WHETHER NOMINAL.** — A condition in a conveyance that intoxicating liquors shall never be sold as a beverage to be drunk on the premises will not be presumed to be a nominal condition and disregarded, though a statute of the state declares that "when any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded." *Sioux City etc. R. R. Co. v. Singer*, 554.
 3. **CONVEYANCE.** — A CONDITION THAT "INTOXICATING LIQUORS SHALL NEVER BE SOLD as a beverage to be drunk on the premises, and if the same is so done habitually with the knowledge and consent of the owner, this instrument shall be void," if inserted in a conveyance of real estate is a valid condition subsequent, the breach of which works a forfeiture of the estate granted. *Sioux City etc. R. R. Co. v. Singer*, 554.
 4. **MUNICIPAL CORPORATIONS — ALIENATION OF PROPERTY BY — RESERVATION IN DEED.** — When a city conveys land to a railroad company, and in the deed reserves the right to cross the railroad tracks with its streets when the city shall have made an addition thereto of certain land, it cannot enforce such reservation until it has made such addition. The reservation in the deed will not be extended beyond its express terms. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
 5. **VOID LIMITATIONS AND CONDITIONS.** — A reservation and condition in a deed by which the vendor reserves to himself, his heirs and assigns, the right to repurchase the land when sold, with the further stipulation that if the vendee conveys the land without giving the vendor the privilege of repurchasing the deed shall be void, is itself void for uncertainty as to time and manner of performance, repugnant to the grant, and opposed to public policy forbidding restrictions on the right of alienation. *Hardy v. Galloway*, 828.
 6. **QUITCLAIM DEED, RIGHTS OF PURCHASER BY.** — A purchaser by quitclaim deed for value and without notice acquires title as against a prior unrecorded deed or other instrument conveying or affecting real estate; but one who takes by quitclaim deed a title which is subject to equities in the hands of the grantor takes subject to such equities. He is, however, entitled to be reimbursed to the extent of the purchase-money he has paid, with interest. *Eoff v. Irvine*, 609.
- See **BOUNDARIES**, 2; **COVENANTS**; **EQUITY**, 3; **ESTOPPEL**; **HUSBAND AND WIFE**, 5; **MUNICIPAL CORPORATIONS**, 3; **SPECIFIC PERFORMANCE**, 2; **VENDOR AND PURCHASER**.

DE FACTO.

See **CORPORATIONS**, 18, 19; **OFFICERS**, 1-4.

DEFINITIONS.

- Check.** *Minot v. Russ*, 472.
Conspiracy. *White v. People*, 196.
Coram non judice. *Little v. Dyer*, 140.
"Debt." *Little v. Dyer*, 140.

- "Descendants." *Soper v. Brown*, 731.
 "Designation." *State v. Saxon*, 46.
 "Et al. or order." *Gordon v. Anderson*, 302.
 Forgery. *State v. Gryder*, 358.
 Gaming-room. *People v. Weithoff*, 532.
 "Glanders." *Pearson v. Zehr*, 113.
 Good-will. *Vonderbank v. Schmidt*, 338.
 Incurable insanity. *Chattanooga etc. R. R. Co. v. Lyon*, 72.
 "Issue." *Soper v. Brown*, 731.
 Laborer. *Consolidated Tank Line Co v. Hunt*, 285.
 Negligence. *Gunn v. Ohio River R. R. Co.*, 842.
 Novation. *Griggs v. Day*, 704.
 Officer de facto. *Waterman v. Chicago etc. R. R. Co.*, 223.
Per stirpes. *Kent v. Church of St. Michael*, 693.
 Process. *Wilson v. St. Louis etc. R'y Co.*, 624.
 "Security." *Prentiss Tool etc. Co. v. Schürmer*, 737.
 "Stretching." *Chattanooga etc. R. R. Co. v. Lyon*, 72.
 "Then and there." *Palmer v. People*, 146.

DE JURE.

See CORPORATIONS, 18, 19; OFFICERS, 2, 4.

DELIVERY.

See CARRIERS, 1, 3.

DEMURRER.

See JURISDICTION, 2; PLEADING, 1-3, 7.

DESCENT.

See DEVISE, 1; HUSBAND AND WIFE, 1.

DESERTION.

See MARRIAGE AND DIVORCE, 2, 3.

DETINUE.

DETINUE DOES NOT LIE FOR THE RECOVERY OF FIXTURES which are attached to and a part of the realty. *McFadden v. Crawford*, 894.

DEVISE.

1. **WILLS — ISSUE, WHO ARE.** — The word "issue," when used in a will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants." Hence, if a testator devises property to his daughter E. for life, and declares that upon her death it shall go, in fee-simple, as tenants in common, to her issue if more than one, and in default of such issue, to all the testator's grandchildren who may be then living, and when the daughter E. dies her children are all dead, but children of theirs are living, such children are comprehended in the term "issue" and take the property in preference to the grandchildren of the testator. *Soper v. Brown*, 731.
2. **REMAINDERS FOR AFTER-BORN CHILDREN.** — Under a will by which a testator devises all his estate to trustees to be by them divided into equal

parts, and directs them to pay the income of one part to each of his children during their lives, and after the death of any child, to pay over and divide the said share among his or her children then surviving, and the lawful issue of such child or children who may die leaving issue, in equal proportions *per stirpes*, each of the grandchildren takes a vested remainder in the share of his parent, liable, however, to open and let in afterborn grandchildren, and the rights of these latter cannot be destroyed by a conveyance executed by the trustees and the other persons in being. *Kent v. Church of St. Michael*, 693.

3. **WILLS** — SPECIFIC DEVISE CONSTRUED TO BE FULL MEASURE OF DEVISEE'S PORTION OF ESTATE, WHEN. — Where a testator specifically devises to two of his children, as tenants in common, a tract of land, "to be in full of their portion of my estate, both real and personal," and after making other devises to his other children directs his executor to sell the residue of his estate, real and personal, and, after paying his debts, to divide the remainder among his heirs, as follows: to his wife one-third part thereof, "and the remainder to my children in equal portions, share and share alike," the land specifically devised to the two children first mentioned is the complete measure of what the devisees are to take or receive as their part, share, division, or portion of the testator's estate, and they take nothing under the residuary clause. *Dickison v. Dickison*, 163.

See ESTATES; HUSBAND AND WIFE, 1, 3; WILLS.

DIRECTING VERDICT.

See TRIAL, 8, 9.

DIRECTORS.

See CORPORATIONS, 18-21; JUDGMENTS, 15; QUO WARRANTO.

DISCRIMINATION.

See LEGISLATURE; MUNICIPAL CORPORATIONS, 13-15.

DISEASE.

See ANIMALS, 1; EVIDENCE, 7; INSURANCE, 12; WITNESSES, 2.

DIVIDENDS.

See CORPORATIONS, 7, 8, 16, 17.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOGS.

See ANIMALS, 2, 3.

DOMICILE.

See JURISDICTION, 3; OFFICERS, 5.

DOWER.

See INSURANCE, 9.

DRUGGISTS.

See CONSTITUTIONS, 4.

DUE PROCESS OF LAW.

See STATUTES, 8.

DURESS.

1. **DURESS OF PROPERTY, PAYMENT UNDER.** — When one, in order to recover possession of his personal property from another who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, if made under protest, is deemed to have been made compulsorily, and may be recovered back, at least, where such detention is attended with circumstances of hardship and serious inconvenience to the owner. *Joannin v. Ogilvie*, 581.
2. **DURESS OF REAL PROPERTY, RECOVERY OF PAYMENT MADE UNDER.** — If an invalid and unfounded claim for a lien upon real property is filed, and its owner is so pressed for money that he must obtain a loan, and such loan cannot be procured until such lien is cancelled, and the claimant, knowing these facts, refuses to cancel it until paid the amount thereof, which the owner is therefore obliged to pay to secure the loan, the money so paid is paid under duress and may be recovered. *Joannin v. Ogilvie*, 581.

See ACTIONS.

EJECTMENT.

CONVEYANCE — CONDITIONS SUBSEQUENT — RE-ENTRY. — The common-law ceremony of re-entry need not be performed as a condition precedent to an action to recover the possession of real property for breach of a condition subsequent. *Sioux City R. R. Co. v. Singer*, 554.

See JUDGMENTS, 6; LIS PENDENS, 1; TROVER, 1, 2.

ELECTION.

See INDICTMENT, 2; SLANDER, 1.

ELECTIONS.

1. **CONSTITUTIONAL LAW.** — It is within the power of the legislature of a state to prescribe the manner in which the right of suffrage shall be exercised. *State v. McElroy*, 355.
2. **POWER TO REGULATE BY STATUTE.** — It is within the power of the legislature to make reasonable regulations as to ballots, to the end of preserving the purity of elections and the independence of voters; and the legislature may also declare a rule of evidence by which fraud in a particular case shall be conclusively established without inquiring into the fact whether it does or does not exist. *State v. Saxon*, 46.
3. **CONSTRUCTION OF STATUTES.** — Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result as shown by the ballots deposited by legal electors must not be set aside except for causes plainly within the purview of the statute. *State v. Saxon*, 46.
4. **BALLOTS — CONSTRUCTION OF STATUTE.** — A statute providing that a ballot shall be of plain white paper, clean and even cut, without ornament, designation, mutilation, symbol, or mark of any kind what-

soever, except the name or names of the person or persons to be voted for, and the office to which such person or persons are intended to be chosen, the word "designation" is to be construed to intend only designations in the nature of ornaments, mutilations, symbols, or marks, as distinguished from words and writing; and ballots containing the words "National Republican ticket" and "Free Suffrage ticket" on the inside and body of the ballot are not illegal, nor within the condemnation of the statute. *State v. Saxon*, 46.

5. **STATUTE WHEN MANDATORY.** — When a statute distinctly declares that ballots having a distinguishing mark upon them shall not be received, or shall be rejected, it is to be construed as mandatory and not as directory. *State v. Saxon*, 46.
6. **STATUTE REQUIRING PRINTING OF NAMES.** — A statute requiring the names of all persons to be voted for to be printed on one ticket or ballot is constitutional. *State v. McElroy*, 355.
7. **THE WRITING OF THE NAME OF A CANDIDATE ON A BALLOT** and the erasing of the name of his opponent must be disregarded if the statute requires the names of all candidates to be printed on each ballot. Such statute is mandatory. *State v. McElroy*, 355.

See CORPORATIONS, 9; OFFICERS, 1; QUO WARRANTO.

ELECTRIC LIGHT COMPANIES.

- ELECTRIC CORPORATIONS OWE A DUTY**, independent of statutory regulation, to see that their lines are safe for those who by their occupation are brought in close proximity to them. Hence, if by failure to insulate their wires as required by a municipal ordinance, one lawfully upon a roof, engaged in a service which necessarily requires him to run the risk of coming into contact with such wires, is injured, he is entitled to recover damages; and no presumption will be indulged, in the absence of evidence, that he was guilty of contributory negligence, or that anything in the appearance of the wires indicated their dangerous condition. *Clements v. Louisiana Electric Light Co.*, 348.

See NEGLIGENCE, 4, 8, 21.

ELEVATORS.

1. **LIABILITY OF OWNER.** — When an elevator remains under the control of the owner of the building, he is liable to his tenants for any defect in it, or in its appointments or management, which reasonable care and vigilance can prevent. *People's Bank v. Morgolofski*, 403.
2. **NEGLIGENCE IN MANAGEMENT OF.** — When, in an action to recover for injury received in falling down the shaft of a freight and passenger elevator owned and controlled by the owner of a building or his agent, it is shown that the plaintiff, who was employed by a tenant of the landlord owning the elevator, was injured by walking into the elevator shaft under the supposition that the elevator was there, because the door of the shaft was open and the bar pulled back, and it was too dark for him to see whether the elevator was there or not, the evidence is sufficient to establish the negligence of the owner of the elevator in failing to exercise that ordinary and reasonable caution and vigilance in keeping the elevator door closed to prevent injury to those entitled to ride in the elevator. *People's Bank v. Morgolofski*, 403.
3. **ELEVATORS — NEGLIGENCE IN MANAGEMENT OF — LIABILITY IN DAMAGES.** In an action to recover for injury received in falling down an elevator

shaft, when the accident is caused solely by the negligence of the owner and operator of the elevator, the jury, in estimating the damages, is at liberty to consider the health and condition of the plaintiff before the accident as compared with his present condition in consequence thereof, and whether or not the injury received is in its nature permanent, and how far it is calculated to disable him from engaging in those pursuits and employments for which, in the absence of such injury, he would have been qualified, and also to consider the physical and mental suffering to which he was subjected by reason of such injury, and to allow such damages as will be a fair and just compensation for the injury sustained. *People's Bank v. Morgolofski*, 403.

4. CARE REQUIRED IN MANAGEMENT OF. — The owner of an elevator must operate it with reasonable care and vigilance, and one having the right to use it may assume that this duty is faithfully performed, and he is not required to exercise that degree of care and caution which could properly be demanded of him under other circumstances. *People's Bank v. Morgolofski*, 403.
5. DEGREE OF CARE REQUIRED IN MANAGEMENT OF. — One who owns and operates an elevator, either by himself or his agent, is bound at all times to use reasonable care and caution to make it safe for all persons who have a right to use it, or who use it with the owner's knowledge and consent. *People's Bank v. Morgolofski*, 403.
6. DEGREE OF CARE REQUIRED OF PERSON USING. — An elevator for the carriage of persons is not supposed to be a place of danger to be approached with great caution. On the contrary, it may be assumed, when the door is open, to be at a place which may be safely entered, without making any special examination or stopping to look and listen. *People's Bank v. Morgolofski*, 403.
7. CONTRIBUTORY NEGLIGENCE IN USING WHEN QUESTION FOR JURY. — When a person entitled to use an elevator is injured by falling down the shaft thereof into which he walked under the supposition that he was stepping into the elevator, because the door thereof was open and the bar pulled back, although it was so dark that he could not see whether the elevator was there or not, the question of whether or not he was guilty of contributory negligence in walking into the shaft without first ascertaining if the elevator was at that place is properly submitted to the jury for its determination. *People's Bank v. Morgolofski*, 403.

EMBLEMENTS.

See REAL PROPERTY, 1.

EMINENT DOMAIN.

1. STATUTES CONFERRING POWER to exercise the right of eminent domain are to be construed strictly, and unless both the letter and the spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised. *Ligare v. Chicago*, 179.
2. IN CONSTRUING STATUTES CONFERRING POWER to exercise the right of eminent domain, the question is not as to whether or not the person or corporation seeking to exercise it might not do so with as great safety to persons and property as any other person or corporation, or whether it would work out an equitable result to allow a particular person or corporation to exercise it in a given case. The question is purely one of legal power. That person or corporation which the

statute says may exercise it for a stated purpose, may exercise it for that purpose, but for no other, and no other person or corporation not thus authorized can exercise it for that purpose. *Ligare v. Chicago*, 179.

3. **APPROPRIATION TO PUBLIC USE — DIVERSION TO ANOTHER USE.** — When land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with and which supersedes the former use, unless it appears, by express words or by necessary implication, that such is the legislative intent. *Fort Wayne v. Lake-shore etc. R. R. Co.*, 277.

See **LIMITATIONS OF ACTIONS**, 1; **MUNICIPAL CORPORATIONS**, 18; **RAILROADS**, 2, 3.

ENCUMBRANCES.

See **INSURANCE**, 2, 10.

EN MASSE.

See **EXECUTION**, 4-6.

ENTIRETIES.

See **HUSBAND AND WIFE**, 4.

EQUITY.

1. **EQUITABLE RELIEF — ACQUIESCENCE.** — Whether the right to equitable relief is affected by acquiescence depends upon the circumstances in each case. Where such a defense is claimed, the facts relating to it become material, and may be inquired into. *Jackson v. Stevenson*, 476.
2. **LOST UNRECORDED CONVEYANCE, POWER TO REPLACE.** — If a conveyance of land, not being recorded, has been lost, there is no doubt that equity will relieve the grantee or his successors in interest by compelling the grantor or his successors in interest to execute another conveyance. The right to this relief does not depend upon any statutory provision, but has its sanction in the general jurisdiction of courts of equity. *Kent v. Church of St. Michael*, 693.
3. **MISTAKE IN WRITTEN INSTRUMENT — RELIEF AGAINST, WHEN MAY BE GRANTED.** — In cases of mistake in written instruments, courts of equity interfere not only as between the original parties, but also as against voluntary grantees and purchasers with notice of the facts. When, therefore, a mortgage is by mistake given on the north half of a quarter section of land instead of on the south half of such quarter-section, and a party, having notice of the mistake, buys such south half, advancing as consideration therefor about one fourth of the value thereof, and takes a deed in the name of another person who has notice of the facts, and then makes a sale to an innocent purchaser, who receives a deed, a court of equity will require the party who procures the deed from the mortgagor to account to the mortgagee for the profits made on his purchase over and above what he has paid for the land, and will apply that sum to the payment of the mortgage. *Snyder v. Partridge*, 130.
4. **MORTGAGES, MISTAKE IN DISCHARGING OF RECORD.** — It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon record, and to fully protect them from the

consequence of their acts when such relief will not result prejudicially to third or innocent persons. *Emmert v. Thompson*, 566.

See COVENANTS; JUDGMENTS, 7, 19, 20; SPECIFIC PERFORMANCE; SUBROGATION, 1; TRUSTS, 3.

ERROR.

See APPEAL.

ESTATES.

WILLS — DEVISE WHEN NOT IN TRUST. — A will declaring that the testator gives to his wife all his estate, both real and personal, for the purpose of raising his children, to hold to her and her heirs forever, vests her with an absolute estate and does not create any trust in favor of her children. *Seamonds v. Hodge*, 854.

See ESTOPPEL, 1; JUDGMENTS, 1; WILLS, 2.

ESTOPPEL

1. WHEN NOT CREATED. — When the owner in fee of land labors under a misapprehension that he has only a life estate therein, with remainder to his children, and signifies his consent to their conveyance of their supposed interest by merely signing their deeds thereof, which do not otherwise mention him, without receiving any consideration, and after the deed vesting absolute title in him has been read in the presence of the children's grantee, such original owner or his grantee, in the absence of any misrepresentation or concealment as to the facts constituting title, are not estopped from asserting title to the land. *Estis v. Jackson*, 784.

2. ESTOPPEL IN PARS — CREATION OF. — To create an estoppel *in pars* there must be some conduct of the party against whom the estoppel is alleged amounting to a representation or concealment of material facts, and when everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises. *Estis v. Jackson*, 784.

See BOUNDARIES, 2; CORPORATIONS, 12; INSURANCE, 7; JUDGMENTS, 5, 6.

EVIDENCE.

1. LAWS OF SISTER STATE — PRESUMPTION. — In the absence of a showing to the contrary, the laws of a sister state will be presumed to be the same as those in the state where suit is commenced. *German Bank v. American etc. Ins. Co.*, 316.

2. PRESUMPTION THAT EVERY PERSON HAS PERFORMED A DUTY ENJOINED BY LAW OR CONTRACT is always indulged unless the contrary appears. *Clements v. Louisiana Electric Light Co.*, 348.

3. NOTICE OF CONTENTS OF CONVEYANCE. — IT MAY BE PRESUMED AS A FACT THAT A GRANTEE who personally accepts and retains a conveyance knows its contents. *Blinn v. Chessman*, 536.

4. PRESUMPTION UNFAVORABLE TO PARTY FAILING TO TESTIFY NOT WARRANTED, WHEN. — A presumption unfavorable to a defendant does not arise from his failing to appear and testify as to a matter of business, where it appears that the business was transacted through his subordinates, and that he was entirely unfamiliar with its details. *Wilson v. St. Louis etc. Ry Co.*, 624.

5. **SECONDARY EVIDENCE OF CONTENTS OF LOST BOOK OF ACCOUNT ADMISSIBLE, WHEN.** — Secondary evidence of the contents of an account-book of original entries is admissible upon proper proof of the loss of such book. *Anchor Milling Co. v. Walsh*, 600.
6. **RES GESTÆ — QUESTION WHICH MAY CALL FOR.** — If a witness who was present when children were run over by a railway train is asked, "Right at the time and while you were examining the children, — right at the time of the accident, — what, if anything, did you hear the conductor or engineer say?" the form of the question is such as to indicate that the answer may relate to the *res gestæ*, and therefore be admissible, and the trial court should not presume that the answer will be incompetent, and on that account refuse to hear it. *Gunn v. Ohio River R. R. Co.*, 842.
7. **EVIDENCE CONCERNING DISEASED CONDITION OF ANIMALS.** — In an action against defendants for slaughtering plaintiff's horses alleged to have the glanders, it is competent for the plaintiff to show that the disease with which his horses were sick was not the glanders, and for this purpose he may introduce witnesses familiar with maladies other than glanders to which horses are subject, and show by them that the sickness from which his horses suffered was a disease of horses other than glanders. The introduction of such testimony is not a violation of the rule which excludes all evidence of purely collateral facts. *Pearson v. Zehr*, 113.
8. **WRITTEN CONTRACTS AND COLLATERAL AGREEMENTS.** — A parol agreement which is collateral to but not inconsistent with a written agreement on a distinct subject-matter, may be proved. Therefore, when a conveyance has been made of land, describing it as bounded upon a public street, the grantee may recover damages for the non-performance of a parol agreement to the effect that, if he would buy such land, the grantor would grade and build the street so as to connect it with a certain public street, and would cause public water to be put in the street. *Durkin v. Cobleigh*, 436.
9. **RAILROADS — RULES — PAROL EVIDENCE TO SHOW APPLICATION OF.** — When rules furnished to railroad employees by the company are intended to be enforced for the protection of the train, the public, and all those engaged in conducting the movement of the train, extrinsic evidence is inadmissible to show to what state of case they are applicable, or how they should be applied, in the absence of any ambiguity in their terms. *Gordy v. New York etc. R. R. Co.*, 391.
10. **WILLS.** — When a will directs that land shall be sold and slaves divided in kind, evidence that the slaves have been divided in kind and assigned to the several legatees is not admissible to show that the land has been sold or divided and allotted to the legatees in like manner. *Smith v. Williams*, 67.
11. **ADMISSIONS TO BE RECEIVED AS EVIDENCE** must be identified as coming from one whose admissions would be legal evidence in the case. *Smith v. Williams*, 67.
12. **ACCOUNT-BOOKS ADMISSIBLE IN FAVOR OF PARTY BY WHOM KEPT.** An account-book of original entries, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the party by whom it is kept. *Anchor Milling Co. v. Walsh*, 600.
13. **LAW CHANGING RULES OF, VALID, THOUGH IT MAKE WITNESS INCOMPETENT.** — Laws which change the rules of evidence relate to the

remedy only, and may be applied to existing causes of action, and to actions pending at the time of their enactment, even though their effect is to render a person incompetent as a witness who was before competent. *O'Bryan v. Allen*, 595.

See ANIMALS, 3; APPEAL, 1, 4, 5, 7; CONSTITUTIONS, 3; DAMAGES, 3; ELECTIONS, 2; ELEVATORS, 2; FRAUD; GIFTS; HOMICIDE, 1, 3-5; JUDGMENTS, 4, 5, 25; MASTER AND SERVANT, 9; NEGLIGENCE, 19; NEGOTIABLE INSTRUMENTS, 12; OFFICERS, 4; PLEADING, 4, 5; QUO WARRANTO; RAILROADS, 3, 5, 7; RAPE, 3, 4; REWARD; SALES, 3; SLANDER, 5, 6; TRIAL, 8, 9; WITNESSES.

EXECUTION.

1. WHAT SUBJECT TO. — BLACKBERRIES GROWING ON BUSHES are not subject to execution as personal property, though a statute of the state authorizes the levy of the writ upon unharvested crops. *Sparrow v. Pond*, 571.
2. EXECUTION SALES — INADEQUATE PRICE. — When property of the value of two thousand dollars, above all encumbrances, is sold under execution for sixty dollars, the price obtained is grossly inadequate. *Lurton v. Rodgers*, 214.
3. EXECUTION SALES — INADEQUACY OF PRICE WHEN A GROUND FOR SETTING ASIDE. — Though mere inadequacy of price will not ordinarily be deemed sufficient of itself to set aside an execution sale, yet it may be considered in connection with other irregularities in the proceedings, and when the inadequacy is great the sale may be set aside upon slight additional circumstances. *Lurton v. Rodgers*, 214.
4. EXECUTION SALE EN MASSE FOR INADEQUATE PRICE — LACHES IN FILING BILL TO REDEEM. — When city property susceptible of division is sold under execution *en masse*, for a grossly inadequate price, without first being offered for sale in parcels, and the debtor, who was ignorant of the sale and induced to believe that it would not be made through the representations of the creditor, who was the purchaser, files his bill to redeem within ten months after the time of redemption had expired, is not guilty of laches so as to defeat his right to have the sale set aside and to redeem therefrom. *Lurton v. Rodgers*, 214.
5. EXECUTION SALE EN MASSE FOR INADEQUATE PRICE — WHEN SET ASIDE. — When city property valued at two thousand dollars, free of all encumbrances, consisting of two lots, each with twenty feet frontage and susceptible of division, is sold under execution *en masse* for sixty dollars, without being first offered separately and in parcels, the sale is irregular, and this, coupled with the gross inadequacy in price, authorizes a decree setting aside the sale and allowing a redemption therefrom. *Lurton v. Rodgers*, 214.
6. EXECUTION SALES EN MASSE, WHEN SET ASIDE. — When property susceptible of division is sold under execution *en masse* for an inadequate price without first being offered in separate parcels, the sale will be set aside, if application is made within a reasonable time. *Lurton v. Rodgers*, 214.
7. EXEMPTIONS — LABORER, WHO IS. — One who is the head of a family and who earns his living by the sale of oils at retail from a tank wagon, sometimes driven by himself and sometimes by his minor son, is a laborer who habitually earns his living by the use of a team and wagon, and he is entitled to hold them as exempt from execution, although he also

makes small and infrequent sales of oil from his storeroom. *Consolidated Tank Line Co. v. Hunt*, 285.

8. EXEMPTIONS—PROCEEDS OF INSURANCE UPON EXEMPT PROPERTY.—When personal property, exempt from execution, is destroyed by fire, the proceeds of insurance upon such property is also exempt. *Reynolds v. Haines*, 311.

9. EXEMPTIONS—PENSION MONEY.—A horse obtained by a debtor in exchange for another purchased with pension money, and exempt from levy by statute, is also exempt to its full value when no additional means are invested, though such value is in excess of the amount originally invested in the first horse. *Smith v. Hill*, 329.

See CORPORATIONS, 11, 14; HOMESTEAD, 2; INSURANCE, 3; JUDGMENTS, 13; PROCESS, 5.

EXECUTION SALES.

See EXECUTIONS, 2-6.

EXECUTORS AND ADMINISTRATORS.

See DEVISE, 3; HUSBAND AND WIFE, 6.

EXEMPTIONS.

See EXECUTION, 7-9; HOMESTEAD, 1, 2.

EXPERTS.

See WITNESSES, 2.

EXPRESS COMPANIES.

See RAILROADS, 4.

FALSE REPRESENTATIONS.

See TRUSTS, 3; VENDOR AND PURCHASER, 2.

FEDERAL COURTS.

See JUDGMENTS, 11.

FEES.

See OFFICERS, 2.

FELONIES.

See CRIMINAL LAW.

FENCES.

See ADVERSE POSSESSION; BOUNDARIES, 1; CO-TENANCY.

FIXTURES.

See ATTACHMENT; DETINUE.

FLOODS.

See WATERCOURSES, 3-5.

FORECLOSURE.

See JURISDICTION, 3; MORTGAGES, 4, 6-8.

FORFEITURE.

See DEEDS, 3; INSURANCE, 9.

FORGERY.

1. **THE CHIEF ESSENTIAL ELEMENTS OF FORGERY** are: 1. A writing in such form as to be apparently of some legal efficacy; 2. An evil intent; and 3. The false making of such writing. *State v. Gryder*, 358.
2. **ESSENTIAL ELEMENT OF.** — Intent to defraud is an essential element of the crime of forgery. It must therefore be alleged and proved. *State v. Warren*, 681.
3. **FICTITIOUS SIGNATURES.** — Signing the name of a fictitious person, with intent to defraud, is a forgery. *State v. Warren*, 681.
4. **IMPERFECT IMITATION OF REAL SIGNATURE.** — When one signs the name of a person really existing, but does it so imperfectly or inaccurately that anyone of ordinary prudence would not be deceived by it, he cannot be convicted of forgery; and the question whether or not the attempted forgery was so imperfect as to deceive a man of ordinary prudence, is generally one for the jury. *State v. Warren*, 681.
5. **MISSPELLING OF THE NAME FORGED OR WRITING IT IN SUCH A MANNER AND WITH SO LITTLE RESEMBLANCE** to the signature forged as not to deceive a careful person does not prevent the crime of the writer from being a forgery if there was an intent to deceive, coupled with a possibility of success. *State v. Gryder*, 358.
6. **SUFFICIENCY OF INDICTMENT.** — An indictment alleging that the accused uttered and published a forged check, knowing it to be forged with intent to cheat and defraud, is sufficient, although it does not allege the name of the party intended to be defrauded. *State v. Warren*, 681.
7. **INDICTMENT FOR FORGERY — MISSPELLING THE NAME FORGED.** — **IMMATERIAL VARIANCES** resulting from clerical inaccuracies in transcribing and misspelling a name forged are not necessarily fatal to the indictment. Therefore, setting out in the indictment the name forged as that of J. A. Gandy is not fatal, though in the original instrument such name has much more the appearance of Jo jandy, if such instrument is very illegible and was represented by the accused to have been written by Mr. Gandy. *State v. Gryder*, 358.
8. **ERRONEOUS INSTRUCTIONS.** — Instructions authorizing a conviction of forgery, but wholly omitting the issue of defendant's fraudulent intent, are erroneous. *State v. Warren*, 681.

FRANCHISES.

See MUNICIPAL CORPORATIONS, 8, 9; STATUTES, 4; WATERCOURSES, 1.

FRAUD.

QUESTION OF — WHEN NEED NOT BE SUBMITTED TO JURY. — Though a sale of personal property is presumptively fraudulent for want of change of possession, yet the evidence rebutting such presumption may be so clear and free from dispute as to justify the court in refusing to submit the question of fraud to the jury. *Prentiss Tool etc. Co. v. Schirmer*, 737.

See ACTIONS; BANKS, 1; CARRIERS, 4; ELECTIONS, 2; FORGERY, 2, 3, 6, 8; FRAUDULENT CONVEYANCES; INSOLVENCY, 2; INSURANCE, 15; JUDGMENTS, 9, 18-20; NEGLIGENCE, 14; NEGOTIABLE INSTRUMENTS, 2-4; TRUSTS, 3.

FRAUDULENT CONVEYANCES.

1. **CONVEYANCE CONSIDERED VOLUNTARY TO EXTENT OF DIFFERENCE BETWEEN ACTUAL CONSIDERATION AND REAL VALUE WHEN.** — Where the consideration paid is small in comparison with the real value of the property, and when the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one to the extent of the difference between the actual consideration and the real value of the property, and to that extent will be treated as fraudulent and void as to existing creditors. *Snyder v. Partridge*, 130.
2. **FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.** — When a wife, having money in her own right, gives it to her husband for general use without any agreement or expectation that it is a loan and without any obligation for its repayment, the transaction cannot generally in later years be made the means of protecting the insolvent husband's property against his creditors. In such cases the transaction will generally be deemed to have been made without consideration, and for the purpose of hindering, delaying, and defrauding creditors. *Cass County Bank v. Weber*, 288.

See SALES, 2.

FRUCTUS NATURALES.

See REAL PROPERTY, 1.

GAMING.

GAMING-ROOM, WHAT IS. — A room fitted up for the purpose of furnishing information to enable persons meeting therein to exercise their judgment in laying wagers upon horse-races occurring in another part of the country, and who pay their money irrevocably into the hands of the keeper of the room, to wager it with persons present at the races, the gains of the wager being paid within the room, and the losses being made known to those betting therein, is a gaming-room within the meaning of the Michigan statute, which makes it a misdemeanor for any person, for hire, gain, or reward, to keep or maintain a gaming-room. *People v. Weithoff*, 532.

See NEGOTIABLE INSTRUMENTS, 5.

GARNISHMENT.

See ATTACHMENT; JURISDICTION, 5.

GIFTS.

PAROL GIFT OF LAND FROM FATHER TO SON, EVIDENCE OF. — The mere fact that a son removes from another state to real estate owned by his father, lives thereon with his family, and expends a small sum of money, part of a larger amount received from his father, in keeping the property in repair, is insufficient evidence to establish a parol gift of the property from his father to him. *O'Bryan v. Allen*, 595.

See TRUSTS, 1, 2.

GOOD HEALTH.

See INSURANCE, 12.

GOOD-WILL.

1. **SALE OF BUSINESS.** — **THE GOOD-WILL IS THE FAVOR** which the management of the business wins from the public and the probability that all customers will continue their patronage. It is the chance or probability that custom will be had at a certain place of business in consequence of the way that business has been previously carried on. *Vonderbank v. Schmidt*, 336.
2. **SALE OF BUSINESS WITH THE GOOD-WILL** secures to the purchaser the right to continue the old business at the old stand with the probability in his favor that the customers will continue to go there. *Vonderbank v. Schmidt*, 336.
3. **SALE OF BUSINESS BY RETIRING PARTNER WITHOUT ANY STIPULATION CONCERNING GOOD-WILL** conveys simply the advantage which an established business possesses over a new enterprise. It does not include a stipulation that the business shall continue to have the benefit of the name, reputation, or services of the retiring partner. It transfers only so much of the custom as will continue notwithstanding his retirement. *Vonderbank v. Schmidt*, 336.
4. **EVERY MAN HAS THE RIGHT TO USE HIS OWN NAME** in his own business, though he may interfere with or injure the business of another having the same name, provided he does not resort to any artifice or contrivance for the purpose of producing an impression that the establishments are identical, nor do anything calculated to mislead. *Vonderbank v. Schmidt*, 336.
5. **SALE OF BUSINESS AND GOOD-WILL THEREOF DOES NOT INCLUDE THE RIGHT TO USE THE VENDOR'S NAME**, and he is therefore entitled to an injunction to prevent such use by the vendee. *Vonderbank v. Schmidt*, 336.
6. **SALE OF BUSINESS — RIGHT TO USE VENDOR'S NAME.** — If the proprietor of a hotel commonly known by his name sells the hotel and business and good-will thereof, this does not involve the right to continue the use of his name in connection with such hotel, and if such use is attempted, he is entitled to injunction to prevent its continuance. *Vonderbank v. Schmidt*, 336.

See **CONTRACTS**, 4; **TRADE-MARKS**.

GRAND JURY.

See **CONSTITUTIONS**, 4; **HOMICIDE**, 7; **INDICTMENT**.

GRANTS.

See **DEEDS**, 5.

GUARANTY.

See **NEGOTIABLE INSTRUMENTS**, 7; **RAILROADS**, 30.

HABEAS CORPUS.

ISSUANCE OF — JURISDICTION. — When a court has jurisdiction to adjudge a petitioner to the custody from which he seeks to be released by *habeas corpus* grounded on errors committed by the committing magistrate, the writ will not issue. *Turner v. Conkey*, 251.

See **JUSTICE OF THE PEACE**, 1.

HABITATION.

See **LANDLORD AND TENANT**, 1.

HEIRS.

See DEEDS, 5; DEVISE; ESTATES; HUSBAND AND WIFE, 1-3, 5; JUDGMENTS, 1; MORTGAGES, 5.

HIGHWAYS.

See RAILROADS, 1, 60.

HOMESTEAD.

1. **EXEMPTION — INVESTMENT OF PROCEEDS IN ANOTHER STATE.** — When the proceeds of the sale of a homestead in one state are invested in a homestead in another, and the latter homestead is sold and the proceeds reinvested in another homestead in the former state, the last homestead is not exempt, but is liable for the debts of the homestead claimant incurred in that state prior to the last investment. *Dalton v. Webb*, 314.
2. **PARTIAL USE OF HOTEL AS.** — When a two-story building is used in part as a homestead and in part as a hotel, and the rooms on the first floor used for hotel purposes are also used by the family as a passage-way between rooms occupied as a home and for ingress and egress to the building, and the second story of the building, though used exclusively for hotel purposes, is inaccessible except through that part occupied as a homestead, the whole building must be treated as a homestead, and therefore declared exempt from execution. *Cass County Bank v. Weber*, 288.
3. **PARTIAL USE OF BUILDING AS HOME.** — When a homestead claimant uses a particular building as a home, the whole of such building, in cases of controversy, will be presumed to constitute and be a part of the homestead, until it is shown by the adverse party that some specific portion is not of the homestead character, and, therefore, not exempt. *Cass County Bank v. Weber*, 288.

HOMICIDE.

1. **MANSLAUGHTER, EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION FOR.** — On a trial for murder, evidence showing that a warrant for the arrest of the defendant on a charge of bastardy had been issued by a justice of the peace, and placed in the hands of the deceased, who was a constable, for his arrest, that the defendant, expecting such a warrant, armed himself for the express purpose of resisting arrest, and shot and killed the deceased upon his attempting to make the arrest, is sufficient to sustain a verdict finding him guilty of manslaughter. *Palmer v. People*, 146.
2. **MURDER — KILLING OF CONSTABLE WHILE ATTEMPTING TO ARREST UNDER WARRANT WITHOUT SEAL.** — Where a person expecting a warrant for his arrest on a charge of bastardy forms a malicious intention to resist and kill any officer who shall attempt to arrest him on that charge, and in furtherance of that intention does shoot and kill a constable while attempting his arrest, knowing and believing that the deceased only intended to arrest him on that charge, and not in self-defense, he will be guilty of murder, notwithstanding the fact that the warrant was illegal in having no seal. *Palmer v. People*, 146.
3. **MURDER — THREATS, EVIDENCE OF ADMISSIBLE, THOUGH NOT KNOWN TO DECEASED, WHEN.** — Where a person makes a threat to use a revolver upon another whom he believes to be a constable, in case he should at-

tempt to arrest him, evidence of such threat will be admissible against him on his trial for the subsequent killing of a constable while attempting to arrest him, as tending to show malice and evil intention on his part, and to give character to his act in killing the deceased, whether the latter knew of his threats or not. *Palmer v. People*, 146.

4. EVIDENCE — STATEMENTS OF DEFENDANT SHOWING MALICE AND ANIMUS.

Where, on the trial for the murder of a constable while attempting to arrest the defendant upon a bastardy warrant, the warrant has been introduced in evidence, evidence that, two days prior to the killing, the defendant, upon seeing a person who had been a constable, said, "I believe he is going to arrest me," and, drawing a revolver from his pocket, added, "If he tries to arrest me, he will hear from this," is admissible as tending to show malice against any officer of the law who might attempt to arrest him, and his premeditated design to make resistance to the arrest which he expected, and, taken in connection with his exhibition of a deadly weapon, as showing his animus. *Palmer v. People*, 146.

5. EVIDENCE — DEFECTIVE WARRANT ADMISSIBLE FOR WHAT PURPOSE.—On

the trial of a defendant for the murder of a constable while attempting to arrest him on a bastardy warrant, defective in not having a seal attached thereto, where the defendant claims that the killing was in self-defense, and in resistance to a supposed hostile movement of the deceased when the latter stretched out his arm, the warrant, although technically defective in the matter of a seal, is admissible in evidence for the prosecution to show that the movement of the deceased toward the defendant was made for a lawful purpose, and under authority of a writ which was supposed by him to confer the right to make the arrest. *Palmer v. People*, 146.

6. INDICTMENT FOR MURDER NEED NOT AVER THAT DECEASED WAS A HUMAN BEING. — An indictment for the murder of one George Bopp need not

aver that the deceased was a human being; the name imports a human being. *Palmer v. People*, 146.

7. INDICTMENT FOR MURDER, SUFFICIENT WHEN. — The conclusion of an indictment for murder in the words "and so the said T. P. did, in the manner and form aforesaid, feloniously, unlawfully, willfully, and of his malice aforethought, the said G. B. kill and murder," etc., is sufficient,

without charging "and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said T. P. did," etc., when the omitted words appear at the beginning of the indictment. Their repetition at the conclusion is not necessary. *Palmer v. People*, 146.

8. INDICTMENT—DEATH FROM MORTAL WOUND GIVEN, SUFFICIENT ALLEGATION OF. — Where an indictment alleges that a wound was given one

day, and that the deceased languished or grew weaker until the next day, and died, this is sufficient to show that he died of the mortal wound given, of which he languished to death; and the respective dates of the stroke and of the death are sufficiently stated. *Palmer v. People*, 146.

9. INDICTMENT — MANNER AND MEANS OF DEATH, SUFFICIENT ALLEGATION OF—An allegation, in an indictment for murder, that the defendant, "with

a certain revolver loaded with gunpowder and leaden bullets, which he, the said T. P., then and there held in his hand, he, the said T. P., did then and there feloniously, unlawfully, willfully, and of his malice aforethought, shoot off and discharge at and upon the said G. B., thereby and by thus striking the said G. B. with one leaden bullet thus discharged from the revolver in the hand of the said G. B., inflicting on

and in the right side of him, the said G. B., one mortal wound," etc., plainly shows that the deceased was struck with the bullet discharged from the revolver. No particular word or phrase need show the manner and means of death, if such fact is made plainly to appear. *Palmer v. People*, 146.

HORSE-RACES.

See GAMING.

HOTELS.

See GOOD-WILL, 6; HOMESTEAD, 2.

HUSBAND AND WIFE.

1. **MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN.**—When a married woman to whom her father has devised part of his estate predeceases him intestate, her children living at the time of the testator's death take as her representatives under the will of their grandfather; and that part of the estate which their father has received for them in land, or invested in land, and which is capable of identification, may be recovered by them from him or from any one holding under him, unless their title has been defeated by prescription or some other means. *Smith v. Williams*, 67.
2. **MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN.**—The fact that a husband, who has acquired land by virtue of his marital rights, and by inheritance as sole heir of his wife, has often declared while in possession that it belonged to his children, and that he intended they should have it, together with the fact that he has placed some of them temporarily in possession of part of the land, is not sufficient to vest the title thereto in them nor to raise a trust in their favor. *Smith v. Williams*, 67.
3. **MARITAL RIGHTS IN PROPERTY AS AFFECTING CHILDREN.**—When by law a husband is the sole heir of his wife, and his marital rights can attach to her real and personal property, her children upon her death will take no interest in a devise or legacy to which, under her deceased father's will, she was entitled at the time of her marriage, and as to which she died intestate. *Smith v. Williams*, 67.
4. **TENANCY BY ENTIRETIES CAN EXIST ONLY** where there is a conveyance of a vested interest in the title of real property. *Matter of Albrecht*, 700.
5. **MARRIED WOMEN — SEPARATE ESTATE.**—A deed to a trustee of a married woman and her heirs and assigns does not create a separate estate in her. *Warren v. Castello*, 669.
6. **IF A HUSBAND AND WIFE CONTRIBUTE EQUALLY** from their separate estates moneys which they invest in a bond and mortgage taken in their joint names, to be held by them, their executors, administrators, or assigns, they become tenants in common thereof, and neither can take anything by right of survivorship on the death of the other. *Matter of Albrecht*, 700.

See FRAUDULENT CONVEYANCES, 2; INSURANCE, 9; MARRIAGE AND DIVORCE.

IMPEACHMENT.

See ACTIONS; NEGLIGENCE, 14.

IMPROVEMENTS.

See DAMAGES, 4.

INDEMNITY.

See NEGOTIABLE INSTRUMENTS, 17.

INDICTMENT.

1. **SUFFICIENCY OF.** — When a crime may be committed by several methods, the indictment may charge that it was committed by all, provided the different methods are not inconsistent with or repugnant to each other. *State v. Montgomery*, 684.
2. **JOINDER OF FELONIES IN.** — Several distinct felonies may be charged in the same indictment when all relate to the same transaction, and admit of the same legal judgment, and as a rule the prosecution will not be required to elect on which count it will proceed in such case. *State v. Houx*, 686.
3. **TIME AND PLACE, SUFFICIENT ALLEGATION OF.** — Where one fact is alleged in an indictment, with the time and place, the words "then and there," subsequently used as to the occurrence of another fact, refer to the same point of time and necessarily import that the two were co-existent; and it is sufficient if these words are repeated to every other material fact set up in the indictment. *Palmer v. People*, 146.

See FORGERY, 6, 7; HOMICIDE, 6-9; RAPE, 5, 6; ROBBERY.

INDORSEMENT.

See ATTACHMENT, 1; NEGOTIABLE INSTRUMENTS, 6, 7, 10.

INFANTS.

See DAMAGES, 5; INSURANCE, 9; NEGLIGENCE, 20; RAILROADS, 31-34, 59.

INHERITANCE.

See HUSBAND AND WIFE, 2.

INJUNCTIONS.

See CONTRACTS, 4; CO-TENANCY; GOOD-WILL, 5, 6.

IN PERSONAM.

See JUDGMENTS, 8; PROCESS, 2.

IN REM.

See PROCESS, 4.

INSOLVENCY.

1. **CONVEYANCES IN CONTRAVENTION OF.** — One who advances money to an insolvent under an agreement that he shall receive as security therefor a conveyance of certain property, but to whom such conveyance is not executed until two weeks after such money is received, is not on that account to be ranked as an unsecured creditor receiving security for an unsecured debt, although he had reason to believe that his debtor was solvent when the loan was made. *Bush v. Boutelle*, 442.
2. **ANTECEDENT DEBTS.** — ONE WHO LOANS MONEY, KNOWING IT IS TO BE USED IN PAYING A PRE-EXISTING DEBT, to a borrower in embarrassed

circumstances, and who takes security for such loan, is not thereby guilty of any fraud or evasion of the insolvency law, and such security cannot be set aside or regarded as a fraud upon such law. *Bush v. Boutelle*, 442.

See CORPORATIONS, 14; FRAUDULENT CONVEYANCES, 2

INSTRUCTIONS.

See APPEAL, 7, 8; DAMAGES, 8; FORGERY, 8; NEGLIGENCE, 3; NUISANCE, 1; PLEADING, 4; TRIAL, 3-8.

INSURANCE.

1. **INSURABLE INTEREST IN BUILDING ON LAND HELD UNDER CONTRACT OF PURCHASE.** — One who holds land under a contract of purchase has an insurable interest in a building which he is erecting thereon. *Hall v. Niagara etc. Ins. Co.*, 497.
2. **APPLICANT FOR NOT REQUIRED TO SHOW HIS TITLE UNLESS REQUESTED.** An applicant for insurance is not required to show the exact condition of his title to the property sought to be insured, unless he is requested so to do; and if his application is oral and no deceit is practiced, his failure to mention encumbrances, where no inquiry is made concerning encumbrances, is immaterial. *Hall v. Niagara etc. Ins. Co.*, 497.
3. **CHANGE OF INTEREST.** — THE ISSUING OF AN EXECUTION AND ITS LEVY UPON PERSONAL PROPERTY do not constitute such a change in the interest, title, or possession of the assured as avoids the policy under a condition declaring that it shall be void if any change other than by the death of the assured takes place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise. *Walbradt v. Phoenix Ins. Co.*, 752.
4. **CONDITION IN INSURANCE POLICY AS TO LITIGATION CONCERNING PROPERTY, CONSTRUCTION OF.** — A provision in a policy of insurance that it shall become void if the title or possession of the property insured be involved in litigation, relates to a litigation over the title or possession of the assured, and not to a proceeding instituted to oust a tenant from the property. *Hall v. Niagara etc. Ins. Co.*, 497.
5. **CONSENT TO ASSIGNMENT OF POLICY OF INSURANCE, COMPANY BOUND BY.** When an insurance company, without reservation, consents to the assignment of an insurance policy, representing upon its face an unearned value, to a purchaser of the insured property, who in good faith pays value for such assignment, the company cannot be allowed to set up mental reservations or prior breaches which were unknown to either party, in avoidance of its liability on the policy. *Hall v. Niagara etc. Co.*, 497.
6. **EQUITABLE OWNERSHIP SUPPORTS RECITAL OF OWNERSHIP IN APPLICATION FOR INSURANCE — CONDITION IN INSURANCE POLICY AS TO OWNERSHIP OF PROPERTY, HOW CONSTRUED.** — A condition in a policy of insurance that the policy shall be void unless consent in writing is indorsed thereon by the company, if the assured is not the sole and unconditional owner of the property, relates only to changes arising after the execution and acceptance of the policy, and does not apply to an existing state or condition of the property at the time when the policy was issued. *Hall v. Niagara etc. Ins. Co.*, 497.

7. **INSURANCE IN FAVOR OF THIRD PERSON — NON-PAYMENT OF PREMIUM — ESTOPPEL.** — When a fire insurance policy acknowledges the receipt of the payment of a premium which in fact has not been paid, the fact that the policy is made out and sent to the insured on his express promise to remit the premium does not estop the insurer from denying its validity for non-payment of the premium as against a mortgagee of the assured to whom the loss is made payable, although he received the policy from the assured without notice of the non-payment of such premium. *Union Building Ass'n v. Rockford Ins. Co.*, 323.
8. **INSURANCE IN FAVOR OF THIRD PERSON — EFFECT OF.** — When an insurance policy provides that the loss is payable to a third person as a mortgagee instead of the assured, it is merely a designation of the person to whom it is to be paid, and not an assignment of the policy, or a contract to insure the interest of the mortgagee, and he can claim only what the originally insured is entitled to recover under his contract. *Union Building Ass'n v. Rockford Ins. Co.*, 323.
9. **INSURANCE COMPANY BOUND BY ITS AGENT'S KNOWLEDGE OF TITLE TO PROPERTY INSURED.** — Where a widow insures property belonging to the minor heirs of her deceased husband, making the application in their behalf, they having no guardian, wherein she states that they own the property in fee-simple and that it is unencumbered, the only claim against the property being her dower interest, and the company's agent having, at the time he accepts the premium and issues the policy, full knowledge of such dower interest, his knowledge is the knowledge of the company and binding upon it, and it cannot repudiate the contract after a loss occurs; nor is such policy forfeited by the fact that she subsequently insures her dower interest in the property in another company. In order to assert a forfeiture of an insurance policy on the ground of double insurance, the second policy must have been made to the same persons mentioned in the first policy, and on the same interest in the same property. *Haire v. Ohio etc. Ins. Co.*, 516.
10. **POLICY OF INSURANCE FILLED OUT BY AGENT OF COMPANY NOT AVOIDED BY MISSTATEMENT, WHEN.** — Where an agent of an insurance company who has authority to issue policies without first referring the applications to the company, with full knowledge of the amount of an encumbrance upon the property insured, fills out the application and procures the insured to sign it without reading it to her, the company cannot avoid the policy because the amount of the encumbrance is greater than that stated in the application. *Beebe v. Ohio etc. Ins. Co.*, 519.
11. **WAIVER OF CONDITIONS OF POLICY OF INSURANCE BY AGENT.** — Where an insurance agent, authorized to issue policies without referring the applications to the company, fails to indorse upon a policy issued by him a permission granted by him to mortgage the insured property, as required by the provisions of the policy, such failure will not avoid the policy, the agent having taken an active part in procuring the money for which the mortgage was given, advised in regard to it, and assured the insured that she was protected by the policy, notwithstanding the provision of the policy that no agent, officer, or other representative of the company shall have the power to waive any provision thereof except in writing. *Beebe v. Ohio etc. Ins. Co.*, 519.
12. **LIFE INSURANCE — CONSTRUCTION OF CONDITION IN POLICY.** — When one who has his life insured allows his policy to lapse and the insurance company reinstates him by accepting payment of back dues upon con-

dition that he is of "temperate habits, in good health then and for twelve months past, and free from all disease, infirmity, or weakness"; a slight and temporary illness within the year previous to his reinstatement, which does not render him uninsurable and from which he has entirely recovered at the time of his reinstatement, does not violate such condition nor vitiate his insurance. *French v. Mutual Reserve Fund Life Ass'n*, 803.

13. **INSURANCE POLICY COVERING PROPERTY OWNED BY TWO PERSONS MAY BE RECOVERED UPON BY ONE, WHEN.** — Where a policy of insurance covers property owned in severalty by two persons insured, and the company's agent who issued the policy had knowledge of that fact at the time of its issuance, one of the owners may maintain an action in his own name to recover for a loss affecting his portion of the property. *Beebe v. Ohio etc. Ins. Co.*, 519.
14. **PLEADING GENERAL ISSUE.** — In an action upon a policy of life insurance, if the defendant wishes to prove that certain statements and representations made by the assured in his answers to questions in his application for insurance were untrue, the defendant must, in his answer, specially plead that such statements or representations were false, and thus notify the plaintiff of the issue intended to be made. The pleading of the general issue is not sufficient for this purpose, though the policy of insurance made the application upon which the insurance was based a part of the policy and of the contract, and the plaintiff alleged that he had complied with and performed all the obligations, representations, and warranties required and imposed by the contract. *Benjamin v. Connecticut Indemnity Ass'n*, 362.
15. **PLEADING.** — IF AN INSURER RELIES UPON A SPECIAL MATTER IN DEFENSE he must set it forth by proper pleas. It cannot be shown nor relied upon under the general issue. All matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable on the ground of fraud or otherwise, must be specially pleaded. *Benjamin v. Connecticut Indemnity Ass'n*, 362.

See EXECUTION, 8; SUBROGATION, 3.

INTEREST.

See DAMAGES, 7; DEEDS, 6.

INTOXICATING LIQUORS.

See DEEDS, 2, 3; MUNICIPAL CORPORATIONS, 13-15; SALES, 4.

JOINDER.

See INDICTMENT, 2.

JOINT LIABILITY.

See JUDGMENTS, 2.

JUDGMENTS.

1. **WHEN BIND PERSONS NOT IN BEING.** — If an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, represent the whole

estate, and stand not only for themselves but also for the persons unborn, and a judgment entered in such litigation binds their interest, if it provides for and protects them, and also if the court determines that they have no interest to be protected. Therefore a judgment establishing the existence of a conveyance from the person from whom they all derived title and that it was lost before being recorded, and directing another conveyance to be made in lieu of that so lost, is binding upon the persons not then in being. *Kent v. Church of St. Michael*, 693.

2. **ENTIRETY OF.** — The liability of defendants in a judgment for the payment of money, originating in a joint and several contract, is several in nature, and an irregularity in its rendition, as against one defendant, furnishes no sufficient reason to vacate the judgment regularly rendered as to the other parties defendant therein. *State v. Tate*, 664.
3. **ENTIRETY OF.** — A judgment against several obligors on a bond, one of whom was dead when suit was brought, is irregular, but such irregularity is not sufficient ground upon which to vacate a judgment regularly rendered as to the other defendants therein. *State v. Tate*, 664.
4. **JUDGMENT IS EVIDENCE OF INDEBTEDNESS IN WRITING**, but it does not necessarily follow that judgments are to be placed on the same footing with rights of action on bonds, notes, bills of exchange, leases, contracts, or other evidences of indebtedness in writing enumerated in a statute fixing the period of limitation thereon. *Ambler v. Whipple*, 202.
5. **JUDGMENT WHEN AN ESTOPPEL.** — A judgment for the payment of money is evidence of indebtedness of the highest dignity known to the law; and unlike evidence of indebtedness afforded by bonds, bills, leases, and written contracts, it imports verity and operates as an estoppel to deny its truthfulness. *Ambler v. Whipple*, 202.
6. **ESTOPPEL.** — IF AN ACTION OF TRESPASS, *quare clausum fregit* upon the issue of soil and freehold, a verdict and judgment is entered on that issue, the title as between the parties, at the time of the alleged trespass, is determined and the judgment is conclusive between them in a subsequent action of trespass or of ejectment. *Hailey v. Ano*, 764.
7. **JUDGMENTS AND DECREES RENDERED IN SISTER STATES** by courts of record have the same conclusive effect in other states as they have in the state where rendered, and the rule that judgments of sister states are conclusive on the merits extends with equal force to decrees in chancery. *Ambler v. Whipple*, 202.
8. **JUDGMENTS IN PERSONAM OF SISTER STATES** are placed on the same footing as domestic judgments, and entitled to the same credit and effect, when sought to be enforced in the different states, as they, by law or usage, have in the particular states wherein they were rendered. *Ambler v. Whipple*, 202.
9. **JUDGMENTS OF SISTER STATES — PLEA OF FRAUD AGAINST.** — A plea of fraud is not admissible in actions on judgments of sister states, when there was jurisdiction of the person and subject-matter, unless it can be set up in the court of the state rendering such judgment. The judgment in such case is not void, but voidable merely. *Ambler v. Whipple*, 202.
10. **JUDGMENTS OF SISTER STATES — LIMITATION AGAINST.** — A judgment valid and conclusive in the courts of the state where rendered will be enforced in the other states upon the same footing as domestic judgments within such period of limitation as may be prescribed in respect to such judgment by the law of the state where it is sought to be enforced. *Ambler v. Whipple*, 202.

11. **JUDGMENTS AND DECREES OF FEDERAL COURTS** are entitled to the same degree of faith and credit as those of state courts. *Ambler v. Whipple*, 202.
12. **COLLATERAL ATTACK.** — Domestic judgments and those standing upon like footing, as the judgments of sister states, import verity, and public policy forbids their indirect collateral contradiction or impeachment. *Ambler v. Whipple*, 202.
13. **STATUTE OF LIMITATIONS.** — A judgment does not become dormant when execution thereon issues within seven years from its rendition, and entry as prescribe by statute has been made within every seven years thereafter. *Smith v. Williams*, 67.
14. **AMENDMENT OF.** — The court may, in affirming a judgment, strike therefrom the name of a party against whom it was irregularly rendered because of his death prior to the commencement of the action. *State v. Tate*, 664.
15. **A JUDGMENT SHOULD BE VACATED ON MOTION** when it is against a foreign corporation, and is based upon service of process upon a person who is shown by affidavits not to have been its cashier, director, nor managing agent. *Taylor v. Granite State Provident Ass'n*, 749.
16. **PRACTICE.** — **MOTION TO SET ASIDE JUDGMENT** for irregularity will, under the Missouri statute, be entertained if made in the same court within three years from the rendition of the judgment. *State v. Tate*, 664.
17. **PRACTICE.** — **MOTION TO VACATE JUDGMENT** on the ground that the petition upon which it is based does not state facts sufficient to constitute a cause of action cannot be interposed, after the lapse of the term at which the judgment was rendered. *State v. Tate*, 664.
18. **HOW VACATED FOR FRAUD.** — When a party is prevented by fraud or fraudulent misrepresentations from interposing his defense before judgment is rendered he may apply to that court for its annulment and to be let in to defend on the merits; but a plea of fraud in procuring such judgment is not a proper plea to an action thereon. *Ambler v. Whipple*, 202.
19. **WHEN EQUITY WILL SET ASIDE FOR FRAUD AND MISTAKE.** — A court of equity possesses inherent power to set aside a judgment procured and entered by fraud practiced upon the court, or for a mistake made by it, but this power will only be exercised in clear cases, and when the party asking it is himself without fault, and when he proceeds without unreasonable delay after the discovery of the fraud or mistake. *English v. Aldrich*, 270.
20. **JUDGMENT IN FORECLOSURE — WHEN EQUITY WILL NOT RELIEVE AGAINST.** — When a senior mortgagee is made a party defendant to an action by the junior mortgagee to foreclose, under a complaint alleging that any lien held by the senior mortgagee is junior and subordinate to the mortgage in suit, such senior mortgagee has no right, as against the allegations of such complaint, to rely upon a statement made to him by counsel for the junior mortgagee that he is made a party simply to bar his equity of redemption under a judgment for costs held by him; and if, without pleading his senior mortgage, he allows the junior mortgagee to take judgment adjudging the mortgage of the latter to be the senior lien on the property, a court of equity will not set such judgment aside as having been obtained by fraud or rendered through mistake of the court. *English v. Aldrich*, 270.
21. **JUDGMENT BY CONFESSION, WHAT IS.** — The confession of judgment contemplated by section 66 of the Illinois practice act is a confession of judg-

ment in a proceeding instituted without process, and has no reference whatever to a *cognovit actionem*, or confession of judgment signed by the defendant in the action after suit brought, which was resorted to at common law in many different kinds of actions. *Little v. Dyer*, 140.

22. JUDGMENT BY CONFESSION, DEBTS UPON WHICH MAY BE FOUNDED. — The word "debt" in section 66 of the Illinois practice act, which provides that any person, for a debt *bona fide* due, may confess judgment by himself or attorney, duly authorized, either in term time or vacation, without process, is used as indicative of a sum certain that is owing from one person to another. *Little v. Dyer*, 140.
23. JUDGMENTS, POWER TO CONFESS NOT EXTENDED BEYOND PROVISIONS OF STATUTE. — Sound public policy demands that the power of confessing judgments under and by virtue of warrants of attorney should not be extended beyond the provisions of the statute and the decisions in the adjudicated cases. *Little v. Dyer*, 140.
24. JUDGMENT BY CONFESSION FOR UNCERTAIN AND UNLIQUIDATED AMOUNT. An unrestricted power, donated by warrant of attorney, to confess a judgment against the donor for an uncertain, unliquidated, and unlimited amount of money paid out for water rates, gas bills, and for cleaning demised premises and keeping them in a healthy condition, cannot lawfully be either given or exercised. A party cannot be permitted to coerce payment of a claim, however just, without the sanction of judicial authority. *Little v. Dyer*, 140.
25. CONFESSION OF JUDGMENT AT COMMON LAW, HOW RESTRICTED. — At common law, a confession of judgment without process or any action pending was by means of a warrant of attorney, and unless the amount was mentioned in the warrant itself was restricted to notes, bills, bonds, or other instruments or evidences of indebtedness wherein the amount for which the judgment was to be confessed was so specified that it could readily be determined by mere inspection or computation, and did not require judicial inquiry for its ascertainment. *Little v. Dyer*, 140.
26. JUDGMENT BY CONFESSION, VOID WHEN. — A warrant of attorney in a lease providing for the payment of a fixed amount of rent, in specified sums, at stated times, and that all water rates, gas bills, and expenses of keeping the premises in a healthy condition shall be additional rent, which undertakes to grant the power to waive process and the service thereof, and to confess judgment from time to time, for any rent then due by the terms of the lease, with costs, etc., attempts to authorize a proceeding unknown to the common law, and not contemplated by the statute, and a judgment of the court based on such warrant is *coram non iudice* and void. *Little v. Dyer*, 140.
27. JUDGMENTS BY CONFESSION — CLERK NOT INVESTED WITH JUDICIAL POWERS. — Under section 66 of the Illinois practice act, which gives to the clerk authority to enter judgments by confession either in term time or vacation, he is not, and could not lawfully be, invested with power to ascertain from evidence *dehors* the instruments filed, the amounts for which judgments are to be entered. He has merely authority to examine the papers presented to and filed with him, for the purpose of ascertaining that the formal requirements of the law have been complied with, and has no power whatever to investigate further or adjudicate the amount due. *Little v. Dyer*, 140.

See APPEAL, 2; CORPORATIONS, 15; INSURANCE, 3; JUSTICE OF THE PEACE; LIMITATIONS OF ACTIONS, 3; LIS PENDENS; MORTGAGES, 6, 8; PLEADING, 2, 7; PROCESS, 6; QUO WARRANTO; SUBROGATION, 3.

JURISDICTION.

1. **TEST OF.** — The aggregate sum demanded in good faith is the test of jurisdiction, though made up of several causes of action. *Martin v. Goode*, 799.
 2. **WHEN NOT OUSTED.** — When the sum demanded in good faith is reduced under the jurisdictional limit by failure of proof or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction is not thereby ousted unless there is a misjoinder of parties. If there is simply a misjoinder of causes of action the court should order the action divided, and not dismissed. *Martin v. Goode*, 799.
 3. **NON-RESIDENTS.** — Service of process in a foreclosure proceeding cannot be made upon a mortgagor by leaving a copy with a member of his family at his alleged usual place of residence, when he has in fact gone to another state with the intention of taking up his residence there, has there engaged in business, for several years, voted, sat upon juries, and discharged other duties as a citizen, but has not removed his family there, and has at long intervals visited them in the other state, with a continued intention to remove them to the state of his actual residence. A decree of foreclosure based upon such service is void for want of jurisdiction. *Schlauwig v. De Peyster*, 308.
 4. **PROCESS — UNAUTHORIZED SERVICE — EFFECT OF VOLUNTARY APPEARANCE.** — When a non-resident appears and interpleads in response to the process of a court having no authority or jurisdiction to issue it, such appearance must be regarded as voluntary and a waiver of the right to object to the jurisdiction of the court. *German Bank v. American etc. Ins. Co.*, 316.
 5. **GARNISHMENT OF DEBT DUE NON-RESIDENT FROM FOREIGN CORPORATION.** The courts of one state have jurisdiction to garnish a debt due to a non-resident of that state from a foreign corporation having an agent in the state where suit is brought, and upon whom process may be served at the suit of one of its residents. *German Bank v. American etc. Ins. Co.*, 316.
- See CORPORATIONS**, 14, 21, 22; **CRIMINAL LAW**; **EQUITY**, 2; **HABEAS CORPUS**; **JUSTICE OF THE PEACE**; **PROCESS**; **STATUTES**, 7, 9.

JURY AND JURORS.

See **CONSTITUTIONS**, 1; **TRIAL**.

JUSTICE OF THE PEACE.

1. **HABEAS CORPUS — JUSTICE'S JUDGMENT.** — A judgment of a justice of the peace holding a prisoner in custody for trial in a case where jurisdiction exists cannot be successfully assailed collaterally by application for writ of habeas corpus. *Turner v. Conkey*, 251.
2. **JUSTICE'S JUDGMENT — COLLATERAL ATTACK FOR ERROR.** — An intermediate error of an inferior tribunal, such as a refusal to grant a change of venue, does not so destroy jurisdiction as to lay its judgment open to collateral attack. *Turner v. Conkey*, 251.
3. **JUSTICE'S JUDGMENT — COLLATERAL ATTACK.** — When there is general jurisdiction of a subject, although vested in an inferior tribunal, its judgment cannot be collaterally attacked. *Turner v. Conkey*, 251.

See **HOMICIDE**, 1.

JUSTIFICATION.

See SLANDER, 4.

LABORER.

See EXECUTION, 7.

LACHES.

See EXECUTION, 4; JUDGMENTS, 19, 20.

LANDLORD AND TENANT

1. FURNISHED HOUSE, WARRANTY OF CONDITION OF. — One who lets for a short time a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to the well understood purpose of the hirer to use it as a habitation, and may be held answerable in damages if it is not fit for such habitation. *Ingalls v. Hobbs*, 460.
2. AGREEMENT BY TENANT TO PAY TAXES — LESSOR'S TITLE. — When a lease from a trustee provides that the tenant shall be liable for the taxes on the leased land in lieu of rent, the successor in interest of such tenant under the lease is liable for all taxes unpaid at the time he took possession, in an action brought by one holding title from such trustee. *Fontaine v. Schulenberg etc. Lumber Co.*, 648.
3. AGREEMENT BY TENANT TO PAY TAXES — LIABILITY OF SUCCESSOR. — When a tenant covenants to pay taxes on the leased land in lieu of rent, his successor in interest under the same lease is liable for all taxes unpaid at the time the latter took possession. *Fontaine v. Schulenberg etc. Lumber Co.*, 648.

See DAMAGES, 7; ELEVATORS, 1, 2; INSURANCE, 4.

LAW AND THE LADY.

See DAMAGES, 1.

LAW OF PLACE.

See CONFLICT OF LAWS.

LEASE.

See JUDGMENTS, 4, 5, 26; LANDLORD AND TENANT; SHIPPING, 8; TROVER, 5.

LEGACY.

See BEQUESTS; EVIDENCE, 10; HUSBAND AND WIFE, 3; WILLS.

LEGISLATURE.

CARRIERS — REGULATION OF FREIGHTS AND FARES — CONSTITUTIONAL LAW. The legislature has authority to delegate power to a commission to provide reasonable rules and regulations in respect to fixing reasonable freight and passenger tariffs by railroads and other common carriers, to prevent unjust discriminations and preferences, and to regulate other matters pertaining to transportation within the state, subject to the right of appeal to the courts. *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 805.

See ELECTIONS, 1, 2; EMINENT DOMAIN, 3; MUNICIPAL CORPORATIONS, 1, 8; STATUTES, 4, 7.

LEVY.

See ATTACHMENT; CORPORATIONS, 1, 9; EXECUTION, 1, 9; INSURANCE, 3; REPLEVIN; SHERIFFS, 1.

LICENSE.

See MUNICIPAL CORPORATIONS, 14, 15; RAILROADS, 29, 30; REAL PROPERTY, 2-6.

LIEN.

See CORPORATIONS, 3, 6; DURESS, 2; MORTGAGES, 3, 6; SHIPPING, 5; SUBROGATION, 2.

LIMITATIONS OF ACTIONS.

1. **PENDENCY OF ANOTHER ACTION.** — A cause of action cannot be said to have accrued until an action can be instituted thereon, and when the regularity of the proceedings for the condemnation of land, as well as the amount of damages due the owner, is pending on appeal, he cannot bring an independent action for such damages. Hence, if he brings his action to recover damages for the injuries sustained, within two years from the termination of the action involving the regularity of the condemnation proceedings, his right to relief is not barred by the statute of limitations. *Fort Wayne v. Hamilton*, 263.
2. **NON-RESIDENCE.** — Although a non-resident debtor has property within the state, the operation of the statute of limitations is suspended while he is absent from the state. *Grist v. Williams*, 782.
3. **JUDGMENTS OF SISTER STATE — LIMITATION AGAINST.** — A judgment or decree rendered by a court of another state, or by the supreme court of the District of Columbia, is, in Illinois, barred in five years after a cause of action accrues thereon. *Ambler v. Whipple*, 202.

See JUDGMENTS, 4, 10, 13, 16.

LIS PENDENS.

1. **THOUGH AN ACTION FOR TRESPASS UPON REAL PROPERTY** is pending and the pleadings are such that the title to the property may be drawn in issue and so decided that the decision will be conclusive on the parties in a subsequent action of trespass or of ejectment, yet as the land itself is not the subject-matter of the action and there is nothing in the pleadings to show that title thereto is involved, the purchaser of it *pendente lite* is not bound by the judgment in a subsequent action involving title to the same land. *Hailey v. Ano*, 764.
2. **JUDGMENT IN TRESPASS, EFFECT OF ON PURCHASER PENDENTE LITE.** — The pendency of a trespass suit does not prevent the purchase of the land upon which the trespass was committed, *pendente lite*, or give a judgment for damages subsequently recovered therein the effect of an adjudication upon the title of such intermediate purchaser, even though he may have known that the action was for trespass upon the land purchased. *Hailey v. Ano*, 764.

LIVE-STOCK.

See CARRIERS, 1, 2.

LOST INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS, 17.

MACHINERY.

See ATTACHMENT, 2; MASTER AND SERVANT, 3; RAILROADS, 45, 49; SALES, 2.

MAGISTRATE.

See HABEAS CORPUS.

MALICE.

See HOMICIDE, 3, 4, 7; SLANDER, 3.

MANSLAUGHTER.

See HOMICIDE, 1.

MANUFACTURERS.

See NEGLIGENCE, 9; SALES, 1.

MARRIAGE AND DIVORCE.

1. **DIVORCE — EXTREME AND REPEATED CRUELTY, WHAT CONSTITUTES.** — One act of force and violence, preceded by insult and abuse, does not constitute such extreme and repeated cruelty as will justify a divorce. No one act of personal violence, although coupled with abusive and derogatory language, constitutes a ground of divorce. *Fritz v. Fritz*, 156.
2. **DIVORCE — DESERTION — REFUSAL OF SEXUAL INTERCOURSE.** — The refusal of a wife, without sufficient reason, to have sexual intercourse with her husband for a period of two years or more does not constitute willful desertion within the meaning of the Illinois statute relating to divorce. The willful desertion which is made a ground of divorce means the abnegation of all the duties of the marital relation, and not of one only. *Fritz v. Fritz*, 156.
3. **DIVORCE — DESERTION AS GROUND FOR — WHAT CONSTITUTES.** — Under the Illinois statute, the desertion or absence which will justify a divorce must be without any reasonable cause, and the reasonable cause which will justify desertion and abandonment must be such as would entitle the party deserted to a divorce. *Fritz v. Fritz*, 156.

MARRIED WOMEN.

See HUSBAND AND WIFE; SPECIFIC PERFORMANCE, 2.

MASTER.

See SHIPPING, 4-6, 8.

MASTER AND SERVANT.

1. **RAILROADS — DUTY OF EMPLOYEE TO CONFORM TO RULES.** — When an employee, on entering the service of his employer, accepts a book of rules prescribing his duties and the manner of performing them, he obligates himself to observe and conform to them according to their plain terms, and not according to what may have been a customary practice among other employees, regardless of the express requirements of such rules. *Gordy v. New York etc. R. R. Co.*, 391.
2. **SERVANT MAY RECOVER FOR INJURY CAUSED BY MASTER AND FELLOW-SERVANT.** — One servant may recover for an injury caused by the combined negligence of the master and a fellow-servant. *Bluedorn v. Missouri Pac. R'y Co.*, 615.

3. **DEFECTIVE MACHINERY — BURDEN OF PROOF.** — In an action by a servant against his master to recover for injuries received in the use of defective machinery, the burden of proof is upon the servant to show that the machinery was defective, that such defects were the proximate cause of his injury, and that the master had knowledge, or might by the exercise of ordinary care have had knowledge of such defects. *Mason v. Richmond etc. R. R. Co.*, 814.
 4. **RISKS ASSUMED BY SERVANT.** — He who engages in the employment of another for the performance of a specified duty for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such duty, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants. *Daniel v. Chesapeake etc. R'y Co.*, 870.
 5. **ASSUMPTION OF RISKS.** — If a man chooses to accept employment and to continue in it with knowledge of its dangers, he assumes the attendant risks and must abide the consequences, so far as any claim to compensation against the employer is concerned. *Baltimore etc. R. R. Co. v. State*, 372.
 6. **DUTIES WHICH MASTER CANNOT ASSIGN.** — A master must exercise in the carrying on of his business all the watchfulness over his servants, and employ all the safeguards, which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, the master is answerable to him, and this remains true though the master had deputed to another employee or servant the performance of the neglected duty. *Daniel v. Chesapeake etc. R'y Co.*, 870.
 7. **VICE-PRINCIPAL, LIABILITY FOR NEGLIGENCE OF.** — When a master gives to his servant the power to superintend, control, and direct other servants engaged in the performance of a work, such servant is, no matter what he is called, as to the men under him, a vice-principal, and the master is liable for his negligent acts and omissions in performing his duties. *Miller v. Missouri Pac. R'y Co.*, 673.
 8. **VICE-PRINCIPAL, LIABILITY FOR.** — For the breach of any duty which a master so owes to a servant that he must perform it in person or by his agent, appointed for that purpose and commonly called a vice-principal or middleman, the master is responsible to a servant injured thereby without his contributory negligence, and where the breach of the duty is by the vice-principal it is not material what his place or grade of service is. *Daniel v. Chesapeake etc. R'y Co.*, 870.
 9. **POWER TO EMPLOY AND DISCHARGE OTHER SERVANTS, QUESTION AS TO — IMPORTANT, WHEN.** — The question whether or not a servant has power to employ and discharge other servants is important in determining whether or not he is to be deemed a superior servant, for whose acts the master is held liable, although it is not necessary to show it by positive proof in every case. *Palmer v. Michigan etc. R. R. Co.*, 507.
- See CARRIERS, 5; RAILROADS, 26, 35-58; REAL PROPERTY, 6; SHIPPING, 8.**

MERGER.

See SUBROGATION, 3.

MINES.

See TROVER, 3-5.

MISDEMEANOR.

See GAMING.

MISJOINDER.

See JURISDICTION, 2.

MISREPRESENTATIONS.

See JUDGMENTS, 18.

MISTAKE.

See BOUNDARIES, 1; EQUITY, 3, 4; ESTOPPEL; JUDGMENTS, 19, 20; MORTGAGES, 4.

MONOPOLY.

See CONTRACTS, 3, 5.

MORTGAGES.

1. WHAT CONSTITUTES. — A CONVEYANCE IN TRUST to protect and save harmless the sureties on a bond given by the grantor, and binding the latter at her death to pay a certain sum to the heirs of her deceased husband, is a mortgage. *Fontaine v. Schulenburg etc. Lumber Co.*, 648.
2. SALE CONDITIONAL. — A bill of sale, by a manufacturer, of property which he has manufactured for another, the work thereon being nearly all done, will not be considered a mortgage from the mere fact that he was indebted to his vendee, and some of the witnesses used the word "security" in describing the transaction, if, from the whole evidence, it is apparent that the transfer was absolute. *Prentiss Tool etc. Co. v. Schirmer*, 737.
3. MORTGAGE LIEN ON SURPLUS FROM SALE UNDER PRIOR ENCUMBRANCE. A mortgage lien will attach to the surplus arising from the sale of the premises under a prior encumbrance. *Snyder v. Partridge*, 130.
4. DESCRIPTION IN, CORRECTION OF. — A mortgagee who takes a mortgage intended to be upon the south half of a quarter-section of land owned by the debtor, but which is by mistake described as the north half of such quarter-section, is entitled, as against the mortgagor, to have the mortgage reformed and foreclosed against the land intended to be described, but not as against a subsequent *bona fide* purchaser without notice of the mistake. *Snyder v. Partridge*, 130.
5. POSSESSION AND RENTS, WHO ENTITLED TO. — A mortgagor or his heirs are entitled to the possession and rents until the mortgagee enters for condition broken. *Fontaine v. Schulenburg etc. Lumber Co.*, 648.
6. JUDGMENT FORECLOSING JUNIOR MORTGAGE, WHEN DOES NOT BAR SENIOR. — When a senior mortgagee is made party defendant to an action by a junior mortgagee to foreclose, under a complaint calling in question only such liens as have accrued subsequent to the execution of the mortgage in suit, and the senior mortgagee simply files a general denial and allows judgment to be taken against him by default, a judgment therein adjudicating the mortgage sued on to be a prior lien does not bar the right of the senior mortgagee to foreclose his mortgage. *English v. Aldrich*, 270.
7. JUDGMENT FORECLOSING JUNIOR MORTGAGE WHEN OPERATES AS BAR AGAINST SENIOR MORTGAGEE. — When a senior mortgagee is made a party defendant to an action by the junior mortgagee to foreclose, under a complaint alleging that any lien held by such senior mortgagee is junior and subordinate to the mortgage in suit, and the senior mortgagee files a general denial, but fails to plead his senior mortgage, a

judgment therein adjudicating that the mortgage sued on is senior to any lien held by him is a bar to his right to foreclose his mortgage. *English v. Aldrich*, 270.

8. **PRACTICE ON APPEAL — EXTENSION OF TIME IN WHICH TO REDEEM.** — A mortgagor whose time to redeem from a mortgage foreclosure as allowed by the court rendering the decree has expired pending an appeal by the mortgagee which prevents redemption, will be allowed an extension of the same time in which to redeem after entry of final judgment upon the appeal. *Schlawig v. De Peyster*, 308.

See EQUITY, 3, 4; HUSBAND AND WIFE, 6; INSURANCE, 7, 8, 11; JUDGMENTS, 20; JURISDICTION, 3.

MUNICIPAL CORPORATIONS.

1. **POWER TO DIVERT PROPERTY FROM ONE PUBLIC USE TO ANOTHER.** — When property is once dedicated to a certain public use, a city cannot take it for another and different public use without express legislative authority. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
2. **LIMITATION OF RIGHT TO ALIENATE PROPERTY.** — A municipal corporation possesses implied power to alienate or dispose of its property, real or personal, of a private nature, unless restrained by charter or statute, but it cannot dispose of property of a public nature in violation of the trusts upon which it is held. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
3. **POWER TO ALIENATE PROPERTY BEFORE DEDICATION TO PUBLIC USE.** — Although a deed which vests the fee-simple to property in a municipality may be of such character as to dedicate it to a public use, yet when the deed vests such title in the city without limitation or restriction as to its alienation, the city may alienate it for a private use at any time before it is dedicated to a public use. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
4. **POWER TO ALIENATE PUBLIC PROPERTY BEFORE DEDICATION.** — When property is purchased in fee-simple by a municipal corporation for a public use, it may alienate such property before it is dedicated to such use, but it cannot convey such property after it has been actually dedicated to a public use. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
5. **MUNICIPAL CORPORATIONS — POWER OF TO TAKE RAILROAD RIGHT OF WAY FOR HIGHWAY.** — A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take part of the right of way of a railroad company by the construction of a public street thereon opened longitudinally. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
6. **STREETS — MUNICIPAL CONTROL OVER.** — A city cannot, under authority to condemn property for streets, condemn it for a railroad track exclusively. The city cannot do indirectly by mere change in form, that which it cannot do directly. Hence it cannot condemn property for streets and afterward by a grant of power allow railroad tracks to be laid upon it, to the extent of excluding all other uses. *Ligare v. Chicago*, 179.
7. **STREETS — RIGHT OF MUNICIPALITY TO GRANT USE OF TO RAILWAYS.** — A municipality may authorize the laying of railroad tracks in their streets, but in thus permitting them to be used the city has no right to so obstruct the streets as to deprive the public and adjacent property-holders of their use as streets. The primary object of a street is for or-

dinary passage and travel, and the public and individuals cannot be rightfully deprived of such use. *Ligare v. Chicago*, 179.

8. **STREETS — RIGHT OF MUNICIPALITY TO GRANT EXCLUSIVE USE OF.** — Under legislative authority authorizing railroad tracks to be laid in streets, a municipality has no power to grant the exclusive use of a street to a railroad company. *Ligare v. Chicago*, 179.
9. **MUNICIPAL CORPORATIONS HAVE NO POWER TO GRANT EXCLUSIVE FRANCHISES OR PRIVILEGES** unless such power has been conferred upon them by a statute explicit and free from doubt. *Long v. Duluth*, 547.
10. **A GRANT BY A MUNICIPALITY OF THE EXCLUSIVE RIGHT** to supply it and its inhabitants with water for the period of thirty years, is not authorized by a statute conferring power upon it to grant the right to one or more private companies or corporations to erect waterworks and supply it and the inhabitants thereof with water, and reserving the right of the municipality to purchase the works at any time after fifteen years. *Long v. Duluth*, 547.
11. **STREETS — USES — ASSESSMENTS FOR WHAT PURPOSES LAWFUL.** — Municipalities are empowered to lay out, open, and improve streets only for such a public use that persons and property within the municipality might be legitimately assessed or taxed to pay therefor. Persons and property cannot be legitimately taxed for the right of way, or the making and improving of a road for a railroad company alone. A street which has been improved and maintained by a city cannot by it be granted to an exclusive use for which it has no authority to lay out, open, or improve it. *Ligare v. Chicago*, 179.
12. **ORDINANCES. — WHEN TWO ORDINANCES** for the widening of a street are passed on the same day and the last one expressly refers to and is by its terms dependent upon the adoption and enforcement of the first, and requires that the entire expense of enforcing both, and all damages which may be adjudged against the city, shall be paid by certain railroad companies in whose interest the ordinances are passed, they will be treated as a single and entire scheme. *Ligare v. Chicago*, 179.
13. **MUNICIPAL CORPORATIONS — ARBITRARY DISCRIMINATIONS.** — A grant of power to municipal corporations to regulate and restrain liquor dealing does not authorize the enactment of an ordinance under which arbitrary discriminations may be made in respect to matters which are exclusively under statutory control and regulation. *Ex parte Theisen*, 36.
14. **ARBITRARY DISCRIMINATION BY ORDINANCE.** — When the personal fitness of an applicant for a license to retail liquor in any place, whether within the limits of a municipal corporation or in the interior of a county, is regulated by state law, municipal authorities have no right by ordinance to arbitrarily discriminate between persons to any extent, based solely on account of personal fitness. *Ex parte Theisen*, 36.
15. **ORDINANCE PERMITTING ARBITRARY DISCRIMINATION.** — When the personal fitness of an applicant for a license to retail liquor in any place is regulated by state law, a municipal ordinance providing that no liquor license shall be used within four hundred and fifty feet of any school or church established at the time such license is granted, without the consent of the municipal council, is void for permitting such council to arbitrarily discriminate between persons as to personal fitness to engage in the retail liquor business. *Ex parte Theisen*, 36.

16. **DELEGATION TO CITY OF POWER TO REGULATE SPEED OF RAILWAY TRAINS MAY BE IMPLIED.** — The delegation to a municipal corporation of the power to regulate the rate of speed of railway trains within its limits need not be given in express terms, but may be implied from the power of the municipality to abate nuisances and to provide for the general welfare. *Bluedorn v. Missouri Pac. R'y Co.*, 615.
 17. **POWER OF TO PUNISH FOR NUISANCE.** — A municipal corporation has no authority to provide by ordinance for the punishment by fine of persons guilty of a nuisance as defined by the ordinance. The power of the city is limited to providing for the abatement of such nuisances. *Knoxville v. Chicago etc. R. R. Co.*, 321.
 18. **LIABILITY FOR WRONGFUL APPROPRIATION OF LAND FOR STREET.** — When a city permanently takes and appropriates private property for a street without condemnation proceedings and without making compensation to the owner, it is guilty of a trespass, and is liable, as a tort-feasor, for taking private property without complying with its charter. *Fort Wayne v. Hamilton*, 263.
 19. **RAILROAD TRAINS, ORDINANCES REGULATING SPEED OF — POLICE REGULATIONS.** — Laws and ordinances regulating the speed of railroad trains are police regulations. *Bluedorn v. Missouri Pac. R'y Co.*, 615.
 20. **ORDINANCE OF CITY REGULATING SPEED OF RAILWAY TRAINS NOT CONFINED TO STREETS AND CROSSINGS.** — A city ordinance prohibiting the running of railroad trains within the city limits at a greater rate of speed than six miles an hour is not to be construed as applying only to streets and crossings. The power to enact such an ordinance does not depend alone, or to any considerable extent, upon the power of the city to regulate the use of its streets. Such an ordinance applies to the switching yards and main track of the railway company as well as to other places. *Bluedorn v. Missouri Pac. R'y Co.*, 615.
- See DAMAGES, 4; DEEDS, 4; ELECTRIC LIGHT COMPANIES; NEGLIGENCE, 6; OFFICERS, 5, 6; WATERCOURSES, 1, 2.

MURDER.

See HOMICIDE.

NAMES.

See DEEDS, 1; FORGERY, 7; GOOD-WILL, 4-6; HOMICIDE, 6; PROCESS, 6; TRADE-MARKS.

NAVIGATION.

See WATERCOURSES.

NEGLIGENCE.

1. **NEGLIGENCE IS THE FAILURE TO DISCHARGE THE DUTY OF TAKING ORDINARY CARE, TO THE INJURY OF ONE TO WHOM THE DUTY IS DUE, SUCH FAILURE BEING THE DIRECT PROXIMATE CAUSE OF THE INJURY TO HIM.** *Gunn v. Ohio River R. R. Co.*, 842.
2. **ORDINARY CARE IS SUCH AS A PRUDENT MAN OF THE REQUISITE SKILL WILL TAKE UNDER THE CIRCUMSTANCES OF THE PARTICULAR CASE.** *Gunn v. Ohio River R. R. Co.*, 842.
3. **THE QUESTION OF ORDINARY CARE IS IN MOST CASES A QUESTION OF FACT. IF, HOWEVER, AS A MATTER OF COMMON KNOWLEDGE AND EXPERIENCE, THE COURT**

can see from the undisputed facts that the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may properly be told, as a matter of law, that he cannot recover. *Creamer v. West End etc. R'y Co.*, 456.

4. **NON-COMPLIANCE WITH AN ORDINANCE.**—If a municipal ordinance prescribes a duty to be performed by an electric corporation, the omission of such duty is negligence, and entitles any person injured thereby to recover damages, unless guilty of contributory negligence. *Clements v. Louisiana Electric Light Co.*, 348.
5. **WHO MAY COMPLAIN OF.**—A plaintiff, seeking to recover for injuries received by him from the negligence of another, must show that the latter committed a breach of some duty owing to the plaintiff or imposed for his benefit. *Woolwine v. Chesapeake etc. R'y Co.*, 859.
6. **CONTRACT WITH MUNICIPALITY — RIGHT OF PRIVATE PERSON TO MAINTAIN ACTION THEREON.**—If, by contract between a municipal corporation and a private person, the latter undertakes to keep the streets in good condition, and through his negligence such streets are permitted to be in a bad condition and so out of repair that a resident is injured without negligence on his part, he is entitled to maintain an action against such contractor to recover compensation for such injuries. *Ober v. Crescent City R. R. Co.*, 366.
7. **DEGREE OF PROOF REQUIRED.**—In cases where negligence is alleged, a wild speculation as to how or from what cause the accident occurred cannot be allowed to stand as proof, or be made the basis for a verdict in favor of the party upon whom the burden of proof lies. There must be evidence upon which the jury could reasonably and properly conclude that the injury was produced by some wrongful or negligent act of the defendant. *Baltimore etc. R. R. Co. v. State*, 372.
8. **RISKS, ASSUMPTION OF.**—One who goes upon a roof over which electric wires are stretched cannot be regarded as going into the presence of known danger and assuming the hazards thereof, and as forfeiting his right to recover for injuries suffered from the negligence of the corporation maintaining such wires in not keeping them properly insulated. *Clements v. Louisiana Electric Light Co.*, 348.
9. **MANUFACTURER OF DEFECTIVE AND DANGEROUS ARTICLES, LIABILITY OF.** One who manufactures and puts a dangerous, faulty article in his stock for sale is deemed to have anticipated that, in the ordinary course of events, it would come into the hands of a purchaser for actual use, either directly or through some intermediate dealer, and is therefore answerable for such damages as result from such use by reason of the faulty and dangerous construction. Hence, if a painter using a stepladder is injured by its breaking because of its being made of poor, cross-grained, and decayed lumber, he may recover damages of its manufacturer, if the latter knew, or ought to have known, of its condition, and that it was dangerous to one using it, and sold it to plaintiff's employer, or to a retail dealer with knowledge that the latter would sell it. *Schubert v. J. R. Clark Co.*, 559.
10. **DAMAGES FROM BLASTING — DUTY TO GIVE NOTICE OF DANGER.**—When contractors engaged in blasting upon a railroad right of way, by habitually giving warning of approaching danger from a blast induce an adjacent land owner to act upon the idea that the usual signal will be given at the accustomed time, the failure to give such signal will subject the contractors to liability in damages for an injury inflicted on such

owner, who puts himself in danger by being misled by such failure. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.

11. NEGLIGENCE IN BLASTING — DUTY OF PERSON IN PERIL. — When a person is placed in peril through the negligence of another in exploding a blast, he need only make an effort to protect himself, and if he makes a mistake and errs in judgment in seeking safety, he cannot be said to be guilty of negligence. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.
12. BLASTING — DUTY TO PROTECT PERSONS PLACED IN DANGER. — Persons using a powerful explosive in blasting are charged with knowledge of any fact in reference to its actual effect, that they could by reasonable diligence have ascertained. They are also charged with the duty to adopt some means to protect persons placed in danger by the explosion of such blasts, and a failure to perform this duty is negligence for which they are liable in damages. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.
13. DAMAGES FROM BLASTING — DUTY TO PROTECT ADJACENT OWNERS. — When a contractor engaged in the construction of a railway knows, or by the exercise of reasonable diligence could know, that stones thrown out by his blasting had been falling on or around the premises of an owner adjacent to the right of way so as to imperil the safety of the latter or his family, while engaged in ordinary domestic duties, it is the duty of the contractor to cover his blasts, or if this is impracticable, to give actual warning to those placed in peril by the explosion. A failure to perform this duty renders him liable for injury inflicted thereby, unless the negligent conduct of the injured party was the proximate cause of the accident. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.
14. CARELESSNESS AS BAR TO RELIEF. — A person who at the time of voluntarily executing a release under seal knows or by inquiry might know the exact nature of the act done, cannot subsequently invoke his own heedlessness to impeach his release by calling such heedlessness some one else's fraud. He has no right to act as one who understands what he is doing, unless he intends to lead those with whom he is dealing to believe that he understands the act done. *Spitze v. Baltimore etc. R. R. Co.*, 378.
15. CARELESSNESS AS BAR TO RELIEF. — A person who executes without coercion or undue persuasion a solemn release under seal cannot subsequently impeach it on the ground of his own carelessness if at the time of its execution he might have advised himself fully as to the nature and legal effect of the act done. He cannot then complain that an imposition has been practiced upon him. *Spitze v. Baltimore etc. R. R. Co.*, 378.
16. NEGLIGENCE, CONTRIBUTORY. — EVEN IN THE PRESENCE OF KNOWN DANGER, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to such danger, unless it is of that character that he must assume the risk from the very nature of the danger to which he is exposed. *Clements v. Louisiana Electric Light Co.*, 348.
17. CONTRIBUTORY NEGLIGENCE ON PART OF PLAINTIFF CAN NEVER BE SET UP AS AN EXCUSE FOR WANTON AND WILLFUL NEGLIGENCE ON THE PART OF THE DEFENDANT. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
18. CONTRIBUTORY NEGLIGENCE DOES NOT PRECLUDE RECOVERY FOR RECKLESSNESS. — When one person inflicts an injury upon another intentionally, or, though unintentionally, yet with a wanton and reckless disregard of its injurious consequences, he is guilty of gross or willful negligence, and the contributory negligence of the plaintiff is not a defense. *Florida etc. R'y Co. v. Hirst*, 17.

19. CONTRIBUTORY NEGLIGENCE MUST BE CLEARLY SHOWN, WHEN. — A court will not relieve from liability, on the ground of contributory negligence, a defendant guilty of a flagrant violation of a law or of a municipal regulation, where the evidence does not make out a clear case of such negligence. *Bluedorn v. Missouri Pac. R'y Co.*, 615.
 20. CONTRIBUTORY NEGLIGENCE, PARENTS OF INFANT CHILD NOT CHARGEABLE WITH, WHEN. — Where the parents of a child four years old, living in a house twenty-five feet back from the street, are poor, and dependent on their labor for a livelihood, the father being sick in a hospital and the mother having to care for two small children in addition to her household duties, and the mother leaves such child on the doorstep of the house eating bread and milk, and goes into the house to get him more food, but on returning in a few minutes finds that he has disappeared, and immediately starts to look for him, but meets persons carrying him home already injured by being run over by a street-car, it cannot be held, as matter of law, that the mother was guilty of contributory negligence. *Rosenkranz v. Lindell R'y Co.*, 588.
 21. NEGLIGENCE, CONTRIBUTORY — ONE WHO COMES INTO CONTACT WITH AN ELECTRIC WIRE in the necessary and lawful discharge of his duties will not on that account be regarded as guilty of contributory negligence if it was the duty of the corporation owning such wire to keep it insulated and it had neglected this duty, and there was nothing in the appearance of the wire to indicate such neglect to the person injured, although he had been cautioned to be careful of the wires and to keep away from them. *Clements v. Louisiana Electric Light Co.*, 348.
 22. CONTRIBUTORY NEGLIGENCE. — Although a person or corporation may be guilty of a negligent act from which injury results to another, yet, if the party injured has by his own negligence contributed to his receiving the injury, he cannot recover damages from the other. *Florida etc. R'y Co. v. Hirst*, 17.
 23. CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR COURT OR JURY. — Ordinarily the question of contributory negligence is for the jury to determine, but sometimes it becomes the duty of the court to instruct that in spite of the negligence of the defendant the plaintiff cannot recover. This responsibility will never be assumed, however, unless the case is a very clear one and presents some prominent and decisive act in regard to the effect and character of which ordinary minds cannot differ. *People's Bank v. Morgolofski*, 403.
 24. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY. — When considerable doubt exists as to whether or not the plaintiff is guilty of contributory negligence, that question should be submitted to the jury for its determination. *People's Bank v. Morgolofski*, 403.
- See APPEAL, 4, 5; CARRIERS, 1, 2, 4; DAMAGES, 2; ELECTRIC LIGHT COMPANIES; ELEVATORS, 2, 3, 7; MASTER AND SERVANT, 2-4, 7; RAILROADS, 3, 8, 9, 16, 18, 20, 22-28, 35, 39, 46, 59; REAL PROPERTY, 4, 6; SUBROGATION, 3; TELEGRAPHS, 1, 3.

NEGOTIABLE INSTRUMENTS.

1. CERTAINTY OF PAYEE. — A note payable to a certain person named therein, "*et al.* or order," is non-negotiable. *Gordon v. Anderson*, 302.
2. FRAUD IN INCEPTION OF — BURDEN OF PROOF. — When the fraudulent inception of a note is shown, the burden of proof is on the person claiming

to be a *bona fide* holder to show under what circumstances he acquired it. *Cover v. Myers*, 394.

3. **FRAUD IN INCEPTION OF — RIGHTS OF BONA FIDE HOLDER.** — When a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation and no other falls with it; but if any subsequent holder takes the instrument in good faith and for value before maturity, he is entitled to recover on it, and so any person taking title under him may recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is that it be proved that he, or some preceding holder or indorsee under whom he claims, acquired title to the paper before maturity, *bona fide* and for value. *Cover v. Myers*, 394.
4. **PROOF OF FRAUDULENT INCEPTION OF.** — Knowledge of the fraudulent origin of a note may be shown to have been possessed by the parties either by direct proof, or by facts and circumstances that fairly lead to that conclusion, and circumstances that are not of any great probative force in themselves are admissible in connection with other proof to show guilty knowledge or want of good faith. *Cover v. Myers*, 394.
5. **BONA FIDE HOLDERS OF.** — When negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with like immunity, unless the paper is absolutely void; as when issued by parties having no authority to contract, or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction. *Cover v. Myers*, 394.
6. **LIABILITY OF INDORSERS.** — The indorser of a note drawn payable to the bearer incurs the same liability and obligation as the indorser of a note drawn payable to order. *Cover v. Myers*, 394.
7. **BONA FIDE INDORSEE.** — When the holder of a note payable to bearer exacts from the indorser a guarantee of indemnity, he may still occupy the position of a *bona fide* indorsee. The motive and purposes to be accomplished by such transaction form a question solely for the jury to determine. *Cover v. Myers*, 394.
8. **NEGOTIABLE INSTRUMENTS HELD ADVERSELY TO PLAINTIFF.** — One to whom certificates of deposit have been issued, payable to his order, cannot recover thereon while they are in the possession of a stranger to the action who claims an interest therein, and against whom it is possible for the plaintiff to maintain an independent action to determine such claim or to recover possession of such certificates. *Read v. Marine Bank*, 758.
9. **IF AN ADVERSE CLAIM IS MADE** to negotiable instruments which are in the possession of a stranger to the action, the court cannot, by bringing such stranger before it as a witness and requiring him to produce the instruments and deposit and leave them with the clerk, give the plaintiff a right to recover thereon. Notwithstanding such deposit, they are still constructively in the possession of the witness and held adversely to the plaintiff. *Read v. Marine Bank*, 758.
10. **AN INDORSEMENT FOR COLLECTION** does not pass the title or the right to the proceeds of the property, but it makes the indorsee a collecting agent or trustee of the holder. *Moore v. Louisiana Nat. Bank*, 332.

11. **COLLECTING AGENT TO WHOM A BILL OF EXCHANGE IS SENT TO PROCURE ITS ACCEPTANCE**, accompanied by a bill of lading, is on the acceptance of such bill authorized to surrender the bill of lading in the absence of instructions to the contrary, and the drawee may refuse to accept unless the bill of lading is surrendered. *Moore v. Louisiana Nat. Bank*, 332.
12. **CONFLICT OF LAWS — USURY.** — When a note purports on its face to be made in one state, though it was in fact made and delivered in another, where the payee resided, it will be presumed to be payable in the state where it purports to have been made, and if valid under the law of that state will not be deemed to be void because it provides for usurious interest under the law of the state where it was in fact made, in the absence of evidence as to where the indebtedness for which it was given was incurred, or where the consideration was delivered, or of any agreement as to the place of payment. *Bigelow v. Burnham*, 293.
13. **CONFLICT OF LAWS.** — The date and place of execution of a promissory note which appear on its face, and not by memorandum entered thereon, raise the presumption that it is payable at that place, and permits it to be enforced under the law prevailing there. *Bigelow v. Burnham*, 293.
14. **CONFLICT OF LAWS — INTEREST.** — When a contract or note is made in one state to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other, the parties will be presumed to contract with reference to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it is a *bona fide* transaction, the contract will be sustained; and if a device for securing usurious interest, it will be held void. *Bigelow v. Burnham*, 293.
15. **CONFLICT OF LAWS.** — The law of the place where a contract or a note by its terms is to be performed or paid determines its validity. *Bigelow v. Burnham*, 293.
16. **COSTS OF COLLECTION.** — A stipulation in a note that in case it is collected by "legal process, the usual collection fee shall be due and payable therewith," is contrary to public policy, and void. *Tinsley v. Hoskins*, 801.
17. **LOST NEGOTIABLE PAPER, WHAT IS NOT.** — A statute authorizing a recovery upon lost negotiable paper, if indemnity is given, does not apply to a case in which it appears that the paper is not lost, but is in the possession of a stranger to the action claiming an adverse interest therein. *Read v. Marine Bank*, 758.

See JUDGMENTS, 4, 5, 25.

NON ABSTANTE VEREDICTO.

See PLEADING, 7.

NONSUIT.

See RAILROADS, 33.

NOTICE.

See AGENCY; APPEAL, 3; CHECKS; CORPORATIONS, 7, 11, 14, 23; MORTGAGES, 4; NEGLIGENCE, 10, 13; PROCESS, 5; VENDOR AND PURCHASER, 1.

NOVATION.

See DEBTOR AND CREDITOR.

NUISANCE.

1. **SMOKE AND CINDERS, WHEN CONSTITUTE.** — In order to recover damages to property caused by smoke, cinders, and steam arising from the chimney of a boiler erected near the property injured, the injury sustained must be of a character to materially diminish the value of the property or seriously interfere with the ordinary comfort or enjoyment of it. Hence an instruction that the jury must find for plaintiff if the injury complained of rendered the premises less comfortable, enjoyable, or useful than they otherwise would have been, is erroneous, as being misleading and entirely too general. *Euler v. Sullivan*, 420.
2. **SMOKE AND CINDERS.** — In determining the question of nuisance from smoke, cinders, or noxious vapor, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. In such cases trifling annoyances and inconveniences, suffered by persons dwelling in cities, will not be regarded as nuisances. *Euler v. Sullivan*, 420.
3. **SEPARATE ACTIONS FOR JOINT NUISANCES.** — It is no defense of a nuisance that a great many others are committing similar acts of nuisance upon the same property. Each and every one is liable to a separate action. Each element of contributory injury is a part of one common whole, and to stop the mischief of the whole, each part in detail is subject to a separate action. *Euler v. Sullivan*, 420.
4. **WHAT DOES NOT CONSTITUTE DEFENSE.** — No place can be convenient for carrying on a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be reasonable, which deprives an adjoining owner of the lawful use and enjoyment of his property, and this without regard to the locality where such business is carried on, and although the business may be lawful, and useful to the public, and the best and most approved appliances and methods are used in its conduct and management. *Euler v. Sullivan*, 420.

See MUNICIPAL CORPORATIONS, 16, 17.

OFFICERS.

1. **OFFICER DE FACTO IS ONE WHO IS IN ACTUAL POSSESSION** of an office under claim and color of an election or appointment, and is in the exercise of its functions and the discharge of its duties. He must hold office under some degree of notoriety, and must exercise continuous acts of an official character. *Waterman v. Chicago etc. R. R. Co.*, 228.
2. **OFFICER DE FACTO — LIABILITY FOR SALARY RECEIVED.** — When an officer *de facto* has received the salary, fees, and emoluments of an office, he is liable therefor to the officer *de jure* in an action for money had and received. *Waterman v. Chicago etc. R. R. Co.*, 228.
3. **OFFICER DE FACTO — ACTION FOR SALARY INVOLVES TITLE TO OFFICE.** — When a person claiming to be an officer brings suit for the salary or compensation belonging to such office, his title to the office is in issue, and if another has the real right to the office, although not the posses-

sion, the plaintiff cannot recover. *Waterman v. Chicago etc. R. R. Co.*, 228.

4. OFFICER DE FACTO AND DE JURE — ACTION FOR SALARY INVOLVES TITLE TO OFFICE. — When a person claiming to be an officer of a public or private corporation brings an action at law to recover the salary incident to that office, which he has no right to receive unless he has a legal right to the office, he necessarily puts his title to the office in issue, and must prove himself to be a *de jure* officer. A certificate of election, commission, or other evidence, may be, under some circumstances, *prima facie* or even conclusive evidence of a *de jure* right. *Waterman v. Chicago etc. R. R. Co.*, 228.

5. CHANGE OF RESIDENCE OF OFFICER AS VACATION OF OFFICE. — When a statute provides that "no person shall hold the office of councilman unless, at the time of his election, he is a resident of the ward from which he is elected, and in the case of the removal of any councilman from the ward from which he was elected the common council shall have power to declare his office vacant and order a special election to fill the vacancy," a councilman duly elected while a resident of one ward does not create a vacancy in the office by his subsequent removal to another ward, in the absence of any action taken by the city council in the matter. *State v. Craig*, 237.

6. PUBLIC OFFICERS, WHEN PERSONALLY LIABLE. — An offer or promise to the effect that a sum specified will be paid to any person furnishing evidence which will lead to the arrest and conviction of the person who shot E. C. and signed J. W. B., T. E. R., J. A. S., "Selectmen of Milton," is a personal promise of the persons so signing it, especially if they did not, in their official capacity, have authority to bind the town of which they were selectmen. *Brown v. Bradlee*, 430.

See CORPORATIONS, 4, 12, 18-20; INSURANCE, 11; QUO WARRANTO; SHERIFFS.

ORDINANCES.

See ELECTRIC LIGHT COMPANIES; MUNICIPAL CORPORATIONS, 12-15, 17, 19, 20; NEGLIGENCE, 4, 19; RAILROADS, 26, 36.

PARENT AND CHILD.

See GIFTS; HUSBAND AND WIFE, 1-3; NEGLIGENCE, 20; TRUSTS, 1, 2.

PARTITION.

PARTITION, WHEN FUTURE CONTINGENT INTERESTS ARE INVOLVED. — Partition will not be decreed when there are contingent remainders, or other future conditional interests, unless all of the parties who may by any possibility be interested, unite in asking for such relief. *Aydlett v Pendleton*, 776.

PARTNERSHIP.

See GOOD-WILL, 3.

PAROL.

See EVIDENCE, 8, 9; GIFTS.

PARTIES.

See CORPORATIONS, 15, 23; INSURANCE, 13; JUDGMENTS, 2; JURISDICTION, 2; MORTGAGES, 6, 7; PARTITION; PROCESS, 8, 9.

PAYMENT.

See BANKS, 3, 4; CORPORATIONS, 7; DURESS; EQUITY, 3; INSURANCE, 7, 12; NEGOTIABLE INSTRUMENTS, 12.

PENDENTE LITE.

See LIS PENDENS.

PENSIONS.

See EXECUTION, 9.

PERSONAL PROPERTY.

See ATTACHMENT, 2; BEQUESTS; DURESS; EXECUTION, 1, 8; FRAUD; INSURANCE, 3.

PLEADING.

1. **DEMURRER WHEN SEVERAL.** — A demurrer in the words, "Come now the defendants and demur severally to each paragraph of the complaint, because the same does not state facts sufficient to constitute a cause of action against defendants," must be regarded as a several demurrer addressed to each paragraph of the complaint. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.
 2. **ERROR IN OVERRULING DEMURRER, EFFECT OF.** — When a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record proper that the judgment rests on the good paragraphs, a reversal must be adjudged. *Terre Haute etc. R. R. Co. v. Sherwood*, 239.
 3. **WHEN ANSWER IS FILED AFTER DEMURRER OVERRULED,** the demurrer is waived and the ruling thereon cannot be assigned for error. *Ambler v. Whipple*, 202.
 4. **THE GENERAL ISSUE** puts the plaintiff on proof of every material averment of his complaint. There being no evidence to uphold the action as against some of the defendants, all charges of the court based upon the theory that there was such evidence were erroneous. *Swift v. Turner*, 101.
 5. **STRIKING OUT PART OF ANSWER — PRESUMPTION.** — When a paragraph in an answer is stricken out, and the evidence admissible under that paragraph is admissible under the general denial filed, it will be presumed that it is stricken out upon that ground. *Fort Wayne v. Hamilton*, 263.
 6. **DISCRETION OF COURT.** — The court has a right, *ex mero motu*, to direct that the pleadings shall be made more explicit, as that all of a will instead of one clause thereof shall be stated. *Martin v. Goode*, 799.
 7. **MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.** — When a plea presenting a bar to the right to recover is interposed, and a demurrer thereto is overruled, a motion for judgment *non obstante veredicto* should be overruled. *Ambler v. Whipple*, 202.
- See CONTRACTS, 1; INSURANCE, 14, 15; JUDGMENTS, 17, 18, 20; MORTGAGES, 6, 7; SLANDER, 1, 2.

PLEDGE.

1. **SURRENDER OF — LIABILITY FOR.** — If a holder of collateral securities surrenders them to the makers thereof without the previous consent or

subsequent ratification of his debtor, the latter does not thereupon become entitled to a credit of the face value of such securities. His credit cannot exceed their actual value, and if they are worthless he is entitled to no credit at all. *Griggs v. Day*, 704.

2. If a holder of collateral securities wrongfully surrenders them without the consent of his debtor, he makes himself liable for their conversion. *Griggs v. Day*, 704.

See CORPORATIONS, 4-8, 10.

POISON.

See CONSTITUTIONS, 2.

POLICE POWER.

See STATUTES, 8.

POSSESSION.

See ADVERSE POSSESSION; CORPORATIONS, 19; FRAUD; HUSBAND AND WIFE, 2; MORTGAGES, 5; NEGOTIABLE INSTRUMENTS, 8, 9; OFFICERS, 1, 3; REPLEVIN; SHERIFFS, 2; SHIPPING, 1; TROVER, 1, 2, 4.

POWERS.

WHEN PERSONAL. — Whenever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom by legal transmission the same character may happen to belong. *Gambell v. Trippe*, 388.

PREMIUM.

See INSURANCE, 7, 9.

PRESCRIPTION.

See HUSBAND AND WIFE, 1.

PRESENTMENT.

See BANKS, 3; CHECKS.

PRESUMPTION.

See CORPORATIONS, 12; DAMAGES, 2; ELECTRIC LIGHT COMPANIES; EVIDENCE, 1-4; FRAUD; HOMESTEAD, 3; NEGOTIABLE INSTRUMENTS, 12, 13; PLEADING, 5; PROCESS, 6; RAILROADS, 24, 26, 32, 39; RAPE, 2; SHIPPING, 3; STATUTES, 7; WILLS, 4.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVILEGE.

See PROCESS, 8, 9; VENDOR AND PURCHASER, 2.

PRIVILEGED COMMUNICATIONS.

See SLANDER, 1, 2, 4-6.

PROCESS.

1. **PROCESS, WHAT IS.** — Any means of acquiring jurisdiction is properly denominated process. *Wilson v. St. Louis etc. R'y Co.*, 624.
2. **JURISDICTION.** — SERVICE OF PROCESS BEYOND THE STATE cannot authorize a personal judgment. *Wilson v. St. Louis etc. R'y Co.*, 624.
3. **JURISDICTION.** — SERVICE OUTSIDE OF THE STATE OF NOTICE OR PROCESS, when not authorized by law, is a nullity. *Wilson v. St. Louis etc. R'y Co.*, 624.
4. **SERVICE OF PROCESS BY PUBLICATION, EFFECT OF.** — Service of process by publication enables the court to give effect to a proceeding, so far only as it is one *in rem*. *Wilson v. St. Louis etc. R'y Co.*, 624.
5. **NOTICE OF MOTION FOR EXECUTION AGAINST NON-RESIDENT STOCKHOLDER OF CORPORATION, SERVICE OF.** — The notice of motion for an order that execution issue against a stockholder of a corporation, an execution against which has been returned unsatisfied, required by section 736 of the Revised Statutes of 1879 to be given to the person sought to be charged, must be a personal notice served within this state. Such a notice served upon a non-resident stockholder outside of this state is a nullity, and would be a nullity even if expressly authorized by the statute. *Wilson v. St. Louis etc. R'y Co.*, 624.
6. **JUDGMENT QUIETING TITLE, IN WHICH THE NAME OF THE OWNER IS INCORRECTLY STATED** or spelled, though the summons is served by publication only, is nevertheless binding upon him, if it is the name by which he is designated in the conveyance by which he acquired title. By accepting the conveyance, he consents to be known by that name in all proceedings relating to the land so conveyed to him, and if that name is used in a legal proceeding or notice, he is presumed to understand that it is addressed to him. *Blinn v. Chessman*, 140.
7. **A RETURN BY A SHERIFF** indorsed upon a summons against two defendants that he had been unable to find the within-named defendants, G. C. and J. S. H. will be construed to mean that he could not find either of them. *Blinn v. Chessman*, 140.
8. **THE PRIVILEGE OF A SUITOR OR A WITNESS TO BE EXEMPT** from the service of process while without the jurisdiction of his residence for the purpose of attending court in an action in which he is a party or a witness is a very ancient one, and extends to every proceeding of a judicial nature taking place in or emanating from a duly constituted tribunal which directly relates to the trial of the issue involved. *Parker v. Marco*, 770.
9. **PRIVILEGE OF SUITOR FROM SERVICE OF PROCESS.** — A non-resident of the state against whom an action is pending in a national court in the state of his residence and who comes to this state to attend the examination, before a notary public, of the plaintiff and the latter's witnesses, is exempt from the service of process, and if, while such defendant is here, the plaintiff dismisses the action in the other state and thereupon commences another for the same cause in the courts of this state and within its territory, serves process on the defendant while he is on his way home, such service is unauthorized, and should be vacated on motion. *Parker v. Marco*, 770.

See CORPORATIONS, 21, 22; JUDGMENTS, 15, 21, 22, 25; JURISDICTION, 3-5; REPLEVIN; SHERIFFS, 1, 3; SHIPPING, 6.

PROFITS.

See SHIPPING, 1.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBERTY.

See RAPE, 1.

PUBLICATION.

See PROCESS, 4, 6.

PUBLIC POLICY.

See CONTRACTS, 3, 5; DEEDS, 5; JUDGMENTS, 12, 23; NEGOTIABLE INSTRUMENTS, 16; TELEGRAPHS, 2; WILLS, 1.

PUNISHMENT.

See CRIMINAL LAW, 1; MUNICIPAL CORPORATIONS, 17; RAPE, 4.

QUIETING TITLE.

See PROCESS, 6.

QUITCLAIM.

See DEEDS, 6.

QUORUM.

See CORPORATIONS, 20.

QUO WARRANTO.

JUDGMENTS IN QUO WARRANTO — CONCLUSIVENESS OF. — A judgment in an action in the nature of *quo warranto* ousting certain persons from the office of directors of a corporation on the ground of the illegality of their election is conclusive evidence against them on this point in another action. *Waterman v. Chicago etc. R. R. Co.*, 228.

RAILROADS.

1. **HIGHWAYS — RIGHT TO CONSTRUCT ACROSS RAILROAD TRACK.** — Railroad companies or other private corporations acquire the right to construct roads, subject to the dominant right of the state to cross such roads whenever the public necessity demands that new roads or streets shall be opened; and the general power to open highways or streets carries with it the power to construct them across railroad tracks, subject to the limitation, however, that such crossing must be constructed at a point where the use of the highway will not deprive the railroad company of the use of its tracks. *Fort Wayne v. Lake Shore etc. R. R. Co.*, 277.
2. **EMINENT DOMAIN — DAMAGES BY BLASTING.** — The prudent use of blasting to remove hard material in constructing a railway is always deemed to have been in contemplation when the damage was assessed for the right as a necessary incident to the privilege; but when damage done to the owner of land adjacent to that within the condemned boundary results from managing or handling explosive material carelessly or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable therefor in a new action. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.

3. **DAMAGES FROM BLASTING ON RAILROAD RIGHT OF WAY.** — The privilege of throwing stones or other material two hundred yards and beyond the right of way by means of blasting in constructing a railway, so as to endanger the lives of owners of adjacent lands and of members of their families when engaged in their domestic duties on their premises, does not pass with the right of way as a necessary incident, and if such persons are thus injured through the negligence of the parties engaged in the construction work the latter are liable in damages. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.
4. **DISCRIMINATION BETWEEN EXPRESS COMPANIES.** — A railroad company cannot be compelled to furnish express facilities to a special express company to conduct an express business over its road the same as it provides for itself or affords to some special express company, when it affords express facilities for all matter offered, has not held itself out as a common carrier of express companies, and is not compelled by special statute. In such case its refusal to carry a special express company over its road is not a violation of a railroad commission's rule that "no railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper to be transported by the train for which it is offered." *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 805.
5. **PASSENGER BOUND TO FURNISH TO CONDUCTOR EVIDENCE OF HIS RIGHT TO RIDE.** — A passenger on a railway car is bound to furnish to the conductor evidence, beyond his own statement, of his right to a passage on the car; if he has a valid contract with the company entitling him to ride, but lacks the evidence of that fact, he should pay his fare when the conductor demands it, and seek redress for a violation of his contract. *Mahoney v. Detroit etc. R'y Co.*, 528.
6. **ACTUAL PAYMENT OF FARE** is not essential to the status of a passenger on a railway train. *Florida etc. R'y Co. v. Hirst*, 17.
7. **DAMAGES FOR CARRYING PASSENGER PAST DESTINATION — EXCESSIVE DAMAGES.** — When a young lady passenger on a railway train is carried one and one half miles past her destination, and there put off the train without personal violence and without being exposed to serious inconvenience, real danger, or harm in walking back to her destination, a verdict for two thousand dollars damages is excessive and will not be sustained, although the conductor in requesting and commanding her to leave the train may have addressed her in a loud tone of voice. *Chattanooga etc. R. R. Co. v. Lyon*, 72.
8. **DUTY AS TO FLAG STATIONS.** — The sale of a ticket to a particular flag station, to be used on a given train, imports an undertaking on the part of the railway company selling it, not only to take the passenger to that station, but to stop there, and allow him a reasonable time and opportunity to alight. A failure on the part of the company to comply with the duty is generally negligence for which it must respond in damages. *Chattanooga etc. R. R. Co. v. Lyon*, 72.
9. **DUTY AS TO FLAG STATIONS.** — When a railway company sells a ticket to a flag station at which its trains do not stop unless signaled for the purpose of receiving or discharging passengers, it is generally the duty of the conductor in charge of the train to ascertain if any passenger is to get off there, and, if so, to stop and allow him an opportunity to alight. A failure to perform this duty is negligence, for which the company is liable in reasonable damages, with additional damages

If the passenger is wrongfully ejected after his destination is passed. This rule is subject to modification when the circumstances are such as to make it unfair and unjust to attribute negligence to the company. *Chattanooga etc. R. R. Co. v. Lyon*, 72.

10. **DUTY TO PROTECT COLORED PASSENGERS.** — A colored passenger upon a railroad train is entitled to the same protection against insults and assaults from drunken passengers as any white passenger. The failure of the conductor to afford such protection when he has power, and knowledge of the necessity for its use, renders the company liable in damages. *Richmond etc. R. R. Co. v. Jefferson*, 87.
11. **CARRIERS.** — ONE WHOM A RAILWAY CORPORATION WAS UNDER NO COMMON LAW OR STATUTORY OBLIGATION TO CARRY in the manner in which he was carried at the time of the accident, is not entitled to enforce against such corporation the obligation and liability of a common carrier. *Robertson v. Old Colony R. R. Co.*, 482.
12. **RAILROAD CORPORATIONS AND EMPLOYEES OF CIRCUS TRAINS.** — If the proprietors of a circus contract with a railway corporation for the hauling of certain cars, according to a schedule of time fixed by agreement, the work to be chiefly at night, and the price to be paid a gross sum, stated in the agreement to be less than the regular rates, and the proprietors agree to load and unload the cars, and to exonerate and save harmless the corporation from any and all claims for damages to persons and property during the transportation, however occurring, and to assume all risk of accident from any cause, an employee of the circus cannot recover of the railway for injuries received by him from one of the cars being out of proper condition, for the railway was not under any duty to inspect the cars, and had no control over their condition. *Robertson v. Old Colony R. R. Co.*, 482.
13. **RAILROADS — PERSON ON TRAIN WITHOUT PAYING FARE, WHEN ENTITLED TO RIGHTS OF PASSENGER.** — One injured in an express car of a passenger train who is known to the conductor, and has not been asked to pay fare, although he has sufficient funds therefor, and who up to six weeks prior to the accident had been an express messenger on the same train, but at the time of the accident was engaged in other business not connected with the railway company, cannot be said to be seeking to obtain a ride without paying fare, nor of practicing a fraud on the conductor or the company by passing himself off as an express messenger. On the contrary, his legal status is that of a regular passenger. *Florida etc. R'y Co. v. Hirst*, 17.
14. **RAILROADS — RULE AS TO PASSENGERS.** — A rule of a railway company which requires that passengers shall remain in the cars set apart for them, and shall not ride in a baggage or an express car or other place of increased danger, is reasonable. *Florida etc. R'y Co. v. Hirst*, 17.
15. **DUTY TO ENFORCE RULES.** — While it is the duty of a railroad conductor to enforce a rule of the company requiring passengers to ride in passenger cars, yet the obligation upon passengers and the protection of the company under such rule are not entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement. *Florida etc. R'y Co. v. Hirst*, 17.
16. **ABANDONMENT OF RULE — LIABILITY FOR NEGLIGENCE.** — When a railroad company has, by its conduct, abandoned a rule intended for the preservation of its passengers, by habitually permitting them and its employees to violate it, the company is precluded from claiming pro-

tection under the rule from liability for an injury caused by its negligence. *Florida etc. R'y Co. v. Hirst*, 17.

17. **VIOLATION OF RULE — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.** When a passenger voluntarily and knowingly violates a reasonable rule of a railway company, which is for his preservation from harm, and brings upon himself injury which he would not otherwise have received, by going from a passenger car into an express car or other place which cannot be regarded as intended for passengers, but naturally suggests that it is not for them, he cannot invoke the mere delinquency of the conductor in enforcing the rule as a defense to his contributory negligence. The burden of proof is upon him to show that he was justified in going and riding where he did. *Florida etc. R'y Co. v. Hirst*, 17.
18. **RULES OF CONTRIBUTORY NEGLIGENCE OF PASSENGER.** — It is contributory negligence for a passenger to ride in an express car, in violation of a known rule of the company, even with the permission, connivance, or knowledge of the conductor, or without his protestations, when that officer is cognizant of both the rule and its infraction, if by the violation of such rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart and offering space for his accommodation. *Florida etc. R'y Co. v. Hirst*, 17.
19. **CROSSINGS. — WHERE A RAILWAY AND A PUBLIC ROAD INTERSECT,** the rights of a traveler and of the railway company are regarded as equal, but of course the traveler must yield the right of way to a train drawing near. If a collision occurs, the railway company is not liable if it used such reasonable care to avoid it as ordinary prudence would suggest. *Hendrickson v. Great Northern R'y Co.*, 540.
20. **CROSSINGS — ORDINARY CARE AT WHEN A QUESTION FOR THE JURY.** — In the event of a collision at the crossing of a railway and a public road, when it is claimed that the person injured was exercising ordinary care, and that the employees of the railway were not, the courts will rarely undertake to determine the question, but will leave it to the jury, because the measure of ordinary care is so variable that the question of negligence is usually and peculiarly the function of the jury. *Hendrickson v. Great Northern R'y Co.*, 540.
21. **CROSSINGS — PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE.** — In an action by an administrator of a person killed at a railway crossing by being run over by a train, to recover damages for such killing it is not necessary for him to prove that the decedent looked or listened, if it appears that the servants of the railway failed to give the warning signals required by law, and the view of the decedent along the tracks was obscured until he reached the place at which his life was jeopardized and finally lost. *Hendrickson v. Great Northern R'y Co.*, 540.
22. **DUTY TO TRESPASSERS.** — When a trespasser upon the track of a railroad, or attempting to cross the track at a place other than a public crossing, is injured by a train, the company is not liable, unless the injury was wantonly and willfully inflicted, or was the result of such gross negligence as evidences willfulness. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
23. **DUTY TO TRESPASSER AND LIABILITY FOR INJURY TO.** — It is the duty of a railroad engineer to exercise ordinary care to avoid striking a trespasser upon the track. If the engineer sees the trespasser and waits

until a warning by sounding the whistle can do no good, when by whistling sooner he could have enabled him to escape, the company is liable for the injury inflicted. *Lake Shore etc. R'y Co. v. Bodemer*, 218.

24. GROSS NEGLIGENCE TOWARD TRESPASSER—WHAT IS.—Such negligence as evidences willfulness by a railroad company toward a trespasser upon its track manifests such gross want of care and regard for his rights as to justify the presumption of wantonness and a willingness to inflict injury, regardless of consequences. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
25. GROSS NEGLIGENCE TOWARD TRESPASSER, WHAT IS.—When a railroad train which strikes and injures a trespasser upon the track is running at unusual speed in a crowded city over street crossings, upon unguarded tracks so connected with a public street and so apparently a continuation thereof as to be regarded by ordinary citizens as located in a public street, along a portion of tracks where persons were known to be passing and crossing every day, in conceded violation of a city ordinance as to speed and without warning of the approach of the train by ringing the bell, this conduct tends to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness, and to show that, if there was a failure to discover the danger of the injured party, such failure was owing to the recklessness of the company's servants in the management of the train. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
26. GROSS NEGLIGENCE OF TOWARD TRESPASSER.—When an engineer upon a railroad train, knowing that persons are accustomed to cross a track between the streets of a large and crowded city, drives his engine forward recklessly and with indifference as to whether such persons are injured or not, and at a rate of speed greatly in excess of that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he is a trespasser, will be regarded as the result of such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
27. CONTRIBUTORY NEGLIGENCE — LIABILITY FOR INJURY TO TRESPASSER.—When a trespasser injured upon a railroad track has been guilty of contributory negligence, the company is still liable, if by the exercise of ordinary care, it could have prevented the accident after discovering the danger in which the injured party stood, or if it failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the peril and averted the calamity. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
28. CONTRIBUTORY NEGLIGENCE BY TRESPASSER WHEN DOES NOT BAR RECOVERY.—Contributory negligence by a trespasser injured upon a railroad track by being struck by an engine cannot be relied upon as a defense in any case where the action of the company or its servants in the premises is wanton, willful, and reckless. In such case the party injured is entitled to recover, if the company could have avoided committing the injury by the exercise of ordinary care. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
29. A LICENSER UPON THE PREMISES OF A RAILWAY CORPORATION IS ONE who, being neither a passenger, servant, nor trespasser, nor standing in any contractual relations to the corporation, is permitted by it to come

upon the premises for his own interest, convenience, or gratification. *Woolbine v. Chesapeake etc. R'y Co.*, 859.

30. **LICENSE TO USE RIGHT OF WAY—LIABILITY FOR INJURY TO FOOTMEN.**—The mere passive permission of footmen to cross the right of way of a railroad company does not impose upon it the duty to provide against dangers to which they may thereby be exposed; yet, if the company directly or by implication induces persons to enter upon and pass over its right of way, it thereby guarantees that the way is in a safe condition suitable for such use, and for a breach of this guaranty it is liable in damages to a person injured thereby. *Lake Shore etc. R'y Co. v. Bodemer*, 218.
31. **DUTY OF TO CHILDREN UPON TRACK.**—A railroad corporation owes, with respect to children of tender years and immature judgment, at least the duty which it owes to domestic animals straying upon its track, to wit, the duty of keeping a reasonable lookout to discover whether they are on the track, as well as to avoid injury to them after they are seen. *Gunn v. Ohio River R. R. Co.*, 842.
32. **CHILDREN ON TRACK, WHETHER MAY BE TREATED AS TRESPASSERS.**—A child of such tender years that he is conclusively presumed to be incapable of committing a crime cannot, if he strays or sits upon a railway track, be regarded as a trespasser to whom no duty is due and for whom no lookout need be kept. *Gunn v. Ohio River R. R. Co.*, 842.
33. **KILLING CHILDREN—CASE FOR THE JURY.**—If children of tender years are run over and killed by a railway train while sitting on or near the track, and the evidence tends to prove that they could have been seen in time to avoid injuring them had a reasonable outlook been kept; that the firemen had been putting coal on the fire and did not see them until too late to stop the train before reaching them; and there was no evidence as to whether the engineer was keeping an outlook or not, and a conflict of evidence as to whether danger signals were sounded or not when the children were seen, a proper case is made for submission to the jury, and it is error for a court to direct a nonsuit. *Gunn v. Ohio River R. R. Co.*, 842.
34. **ORDINARY CARE—QUESTION FOR JURY.**—Whether the servants of a railway corporation in charge of a train which ran over children of tender years, playing or sitting on the track, exercised ordinary care in keeping the requisite outlook to discover such children, or when discovered used such measures as were proper, under the circumstances, to avoid injuring them, is a question which can rarely, if ever, be determined as a matter of law, and should therefore be submitted to the jury. *Gunn v. Ohio River R. R. Co.*, 842.
35. **STATUTORY LIABILITY FOR ACCIDENTS.**—A statute imposing liability for accidents happening "by reason of the negligence of any person in the service of an employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad," does not render a railway corporation liable for injuries resulting from negligence of the conductor of a switch engine while making up a train, consisting of his failure to see that a proper coupling-pin was used. The statute refers only to persons whose duties relate to the charge of a locomotive engine or the train when complete. *Thyng v. Fitchburg R. R. Co.*, 425.
36. **EMPLOYEE OF RAILROAD COMPANY MAY RECOVER FOR INJURY RESULTING FROM VIOLATION OF CITY ORDINANCE, WHEN.**—An employee of a railroad company who is injured by reason of the company's violation of a

city ordinance regulating the speed of railway trains, without having participated in such violation, may recover against the company for the injuries received by him. Nor will his action be defeated by the fact that the persons in charge of the train by which he was injured were fellow-servants, when they were running the train pursuant to a time card prepared and promulgated by the company. *Bluedorn v. Missouri Pac. R'y Co.*, 615.

37. **INJURY TO BRAKEMAN THROUGH VIOLATION OF RULES — EVIDENCE OF CUSTOM.** — When the rear brakeman or flagman on a freight train is furnished with rules by the company declaring his post to be on the last car, which he must not leave except to protect the train, and which require him not to leave his brakes while the train is in motion, nor to take any other position thereon than that assigned him by the conductor, he must conform to such rules, and in case of injury sustained by him in going from the inside of the car to the top thereof by means of ladder strips, evidence to show that it is customary for rear brakemen to ride inside the rear car is inadmissible, in an action brought by him to recover damages. *Gordy v. New York etc. R. R. Co.*, 391.
38. **WAIVER OF RULES.** — A rule of a railway company assented to by a brakeman in its employ is waived by the company when its conductor in charge of the train orders such brakeman to act contrary to such rule, and it is his duty to obey such order. *Mason v. Richmond etc. R. R. Co.*, 814.
39. **NEGLIGENCE, PRESUMPTION OF, FROM AN ACCIDENT.** — THE FACT THAT A FREIGHT TRAIN BROKE APART when it ought not to have done so is not of itself evidence of negligence on the part of the railway corporation for which it is answerable to one of its servants, though the rule is otherwise when the person injured is not an employee. *Thyng v. Fitchburg R. R. Co.*, 425.
40. **NEGLIGENCE, CONTRIBUTORY, PRESUMPTION OF.** — If the evidence shows that an employee of a railway corporation was at the time of receiving injuries engaged in the performance of his duty, and there was nothing to show that he was careless, he is not required to prove that he did any particular act by way of precaution, or was not guilty of contributory negligence. *Thyng v. Fitchburg R. R. Co.*, 425.
41. **NEGLIGENCE, WHAT IS NOT CONTRIBUTORY.** — Though an employee of a railway corporation is not at the time of a collision and of his injury thereby, at his post of duty, or at the place where the rules of the company require him to be, and his conduct contributed to the accident, yet if such conduct was not the direct, immediate, and proximate cause of the accident, and it could have been avoided by the exercise of ordinary care and diligence, which the corporation and its vice-principal failed to exert, then it is answerable to such brakeman, or his representatives, for the injuries received by him in such accident. *Daniel v. Chesapeake etc. R'y Co.*, 870.
42. **NEGLIGENCE — PROXIMATE CAUSE.** — Notwithstanding any real or supposed negligence of an injured servant, a railway company is liable in damages if but for its own want of care the injury could have been avoided. *Mason v. Richmond etc. R. R. Co.*, 814.
43. **NEGLIGENCE PER SE, WHAT IS.** — To require a gang of sixteen men to range themselves in a line along a train of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passes

them heavy steel rails, and then to run fast enough along the uneven ground, usually observed along the side of a railroad track, to be able to have the next rail in position to throw on the car of the moving train at the proper moment as it passes, at least without notifying a new and inexperienced man of the great hazard attending the performance of such work, is negligence *per se*. *Palmer v. Michigan etc. R. R. Co.*, 507.

44. **RISKS ASSUMED BY EMPLOYEES.** — When a railroad brakeman is killed while engaged in the course of his employment, by smoke and gas arising from insufficient ventilation in a tunnel, after he has accepted and continued in the employ of the railroad company with full knowledge of the condition of the tunnel and of the risks of the work therein, there cannot be any recovery for such injury. *Baltimore etc. R. R. Co. v. State*, 372.
45. **MASTER AND SERVANT — DUTY AS TO MACHINERY FURNISHED.** — Although a railway company need not furnish machinery of the very best kind, or attach appliances of the latest and safest kind for the use of its servants, still it is negligent if it uses cars or engines of any particular pattern which an ordinary inspection would show to be defective. *Mason v. Richmond etc. R. R. Co.*, 814.
46. **NEGLECT IN FAILING TO PROVIDE BUMPERS FOR CARS.** — When a failure on the part of a railway company to place any bumpers at all on its cars is the proximate cause of a collision in which a brakeman is injured, this is proof of gross negligence on the part of the company. *Mason v. Richmond etc. R. R. Co.*, 814.
47. **DEFECTIVE CARS — LIABILITY FOR INJURY TO BRAKEMAN.** — When a railroad brakeman, acting under the order of the conductor on a train but contrary to the rules of the company to which he has assented, is injured in coupling defective cars of which defect the company has, or ought to have, knowledge, and of which the brakeman has no notice until too late to avoid the injury, the company is liable therefor. *Mason v. Richmond etc. R. R. Co.*, 814.
48. **DEFECTIVE CARS — LIABILITY FOR INJURY TO BRAKEMAN.** — A railroad brakeman, in coupling cars on a dark night, has a right to assume that they are in good and safe condition, and is not negligent in running between them without stopping to examine whether they are supplied with proper bumpers or not. *Mason v. Richmond etc. R. R. Co.*, 814.
49. **LIABILITY FOR DEFECTIVE CARS.** — When the rolling stock or machinery of a railroad company is so defective in its construction that by an ordinary inspection the company could discover its condition, the company is liable for an injury received by its servant in consequence of such defects, unless, notwithstanding such want of care on the part of the company, the supervening negligence of the servant was the proximate cause of the injury complained of. *Mason v. Richmond etc. R. R. Co.*, 814.
50. **DEFECTIVE CARS — LIABILITY OF COMPANY.** — When freight-cars are obviously so defectively made, whether by a failure to attach bumpers at all or to make them sufficiently long to protect a person standing between the cars while in motion or in consequence of any other fault in construction, that the slightest indiscretion on the part of a servant may endanger his life, the company is liable for any injury resulting from such defects. *Mason v. Richmond etc. R. R. Co.*, 814.

51. **A RAILWAY CORPORATION USING CARS OF ANOTHER** is not answerable for any defect in their original construction, if it made proper provision for inspecting them and for the safety of its employees while using them. *Thyng v. Fitchburg R. R. Co.*, 425.
52. **SERVANT VICE-PRINCIPAL OF MASTER, WHEN.**—Where an assistant road-master of a railroad company has the exclusive and unconditional control of all the men engaged upon a certain work at the time of an accident, with absolute power to employ and discharge them, and to issue to them orders which they are bound to receive and obey, and has full management and control of the work, with power to prescribe the method of its performance, his acts are the acts of the company, and his negligence is the negligence of the company, for which it is legally responsible. A narrow or technical construction of the rule of *respondent superior* is not in harmony with recent Michigan decisions. *Palmer v. Michigan etc. R. R. Co.*, 507.
53. **MASTER AND SERVANT — NEGLIGENCE OF VICE-PRINCIPAL — MEASURE OF DAMAGES.**—When the representatives of a railroad employee are entitled to recover for an injury resulting in death, occasioned by the negligence of a vice-principal of the company in running, conducting, or managing any locomotive or cars, the measure of damages, under the Missouri statute, is five thousand dollars. *Miller v. Missouri Pac. R'y Co.*, 673.
54. **MASTER AND SERVANT — VICE-PRINCIPALS, WHO ARE, AND LIABILITY FOR NEGLIGENCE OF.**—A conductor having charge of a construction train, and a foreman having charge of a crew of men engaged in constructing a railroad track, with power to direct their movements, are both vice-principals, and the railroad company is liable for their negligence resulting in the death or injury to any of such crew. *Miller v. Missouri Pac. R'y Co.*, 673.
55. **LIABILITY TO SERVANT FOR NEGLIGENCE OF PERSON IN CHARGE OF A TRAIN.**—If an assistant yard-master in charge of a train or part thereof, and having with respect to it the same duties and authority as a conductor, knowing that it is standing on the track at a point between stations and cannot be moved for some time, and that before it can be moved another train will be due at the same place, negligently fails to place warning signals at a sufficient distance from the standing train to warn the anticipated approaching train to stop in time to avoid a collision, his negligence is chargeable to the corporation in whose employment he is, and renders it answerable in damages for the injury and death of a brakeman, who, while on the approaching train, is killed by its collision with the standing train, such collision being due to such negligence of the assistant yard-master. *Daniel v. Chesapeake etc. R'y Co.*, 870.
56. **MASTER AND SERVANT — VICE-PRINCIPALS.**—A RAILWAY CONDUCTOR having the entire control and management of a train is the personal representative or vice-principal of his employer, for whose negligence such employer is answerable to subordinate servants. *Daniel v. Chesapeake etc. R'y Co.*, 870.
57. **FELLOW-SERVANTS — WHO ARE NOT.**—A conductor in charge of a railroad train and a brakeman thereon engaged in coupling cars are not fellow-servants. *Mason v. Richmond etc. R. R. Co.*, 814.
58. **NEGLECT OF ONE EMPLOYEE RESULTING IN INJURY TO ANOTHER.** A railway corporation is not answerable to one of its employees for in-

juries resulting from the use of a defective coupling-pin, if it supplied proper pins, and the failure to use them or to replace one too short by a long one, was the fault of one of its servants who used them, and not of the corporation. *Thyng v. Fitchburg R. R. Co.*, 425.

59. NEGLIGENCE IN DRIVING STREET-CAR OVER CHILD, QUESTION FOR JURY, WHEN. — Where a child four years of age, in crossing a street at an hour when there is sufficient light to see him distinctly half-way across the street, falls about four feet in front of a horse attached to a street-car and is run over and injured, and the evidence shows that the driver of the car knew that the street at the place where the accident happened was much frequented by children; that the car could have been stopped within two feet, and that the driver was giving no attention to the track in front of him, and did not see the child before the car passed over him, the question of the negligence of the railway company is properly submitted to the jury. *Rosenkranz v. Lindell R'y Co.*, 583.
60. STREET-RAILWAYS, PASSENGERS ON — WHEN CEASE TO BE. — One who steps from a street-railway to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every occupier, and over which the company has no control. His rights are those of a traveler upon a highway, and not of a passenger. Therefore he cannot recover for injuries received while still standing between the rails of a track of the same railway, under chapter 140 of the statutes of Massachusetts of 1886, for injuries inflicted by another car, unless he affirmatively proves that he was in the exercise of due care to avoid injury in traveling upon such street. *Creamer v. West End etc. R'y Co.*, 456.
61. NEGLIGENCE. — ALIGHTING FROM A STREET-CAR while it is moving is not necessarily negligence as a matter of law. *Ober v. Crescent City R. R. Co.*, 366.
62. DUE CARE. — ONE WHO JUMPS FROM A STREET-CAR in which he has been riding and steps in front of another car going in an opposite direction to the one which he has left and is instantly killed, cannot be regarded as having exercised due care, when it does not appear that he looked to see whether any car was approaching or paid any attention to warnings given him. *Creamer v. West End etc. R'y Co.*, 456.
- See CARRIERS; CORPORATIONS, 19; DEEDS, 4; EVIDENCE, 6, 9; LEGISLATURE; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 5-8, 11, 12, 16, 19, 20; NEGLIGENCE, 10, 13, 20; STATUTES, 9, 10; WATERCOURSES, 3, 5.

RAPE.

1. AGE OF CONSENT — PUBERTY. — When the statute defining rape fixes the age at which the female is deemed incapable of consent, the act of carnally and unlawfully knowing a female under that age is a rape, though she had attained the state of puberty. *State v. Houx*, 686.
2. AGE OF CONSENT — BURDEN OF PROOF. — On the trial of a person accused of committing a rape upon a girl under the statutory age of consent, the burden of proof is on the prosecution to prove that she was under that age, but there is no presumption that she had arrived at such age. *State v. Houx*, 686.
3. EVIDENCE. — A person on trial for rape will not be permitted to prove that he had reason to believe that the prosecutrix was, at the time of the carnal knowledge, over the statutory age of consent. *State v. Houx*, 686.

4. **EVIDENCE OF PHYSICAL CONDITION OF FEMALE—WHEN TOO REMOTE.**
On a trial for rape it is competent to prove the physical condition of the female immediately after the outrage as tending to establish the commission of the offense, but evidence of her condition three months thereafter is too remote, and is therefore inadmissible. Error in admitting it is, however, harmless when the guilt of the accused is clearly established by other evidence, and the verdict fixes the lowest punishment prescribed by the statute. *State v. Houz*, 686.
5. **SUFFICIENCY OF INDICTMENT FOR.**—An indictment for rape charging the act of felonious carnal knowledge to have been committed on a certain day with a female child under the statutory age of consent, is sufficient, if such age is stated. *State v. Houz*, 686.
6. **INDICTMENT FOR RAPE CHARGING force, and want of consent, need not allege the age of the female, or state that she was over the statutory age of consent.** *State v. Houz*, 686.

RATIFICATION.

See CORPORATIONS, 12; PLEDGE, 1.

REAL PROPERTY.

1. **WHAT IS.**—**FRUCTUS NATURALES** in which are included the fruit of trees, perennial bushes, and grasses growing from perennial roots are, while unsevered from the soil, considered as pertaining to it and a part of the realty. If a tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, it and its products cannot be regarded as emblements though the manurance and labor of the owner aid their growth and production. *Sparrow v. Pond*, 571.
2. **TO A MERE LICENSEE ON THE PREMISES OF ANOTHER THE LATTER OWES NO DUTY** other than that of not willfully nor wantonly injuring him. The license must be accepted subject to the risks and perils attendant thereon. *Woolwine v. Chesapeake etc. R'y Co.*, 859.
3. **LICENSEE, DUTY OF LAND-OWNER TO.**—The owner of land or of a building does not owe to persons coming there for their own convenience or as mere licensees the duty of keeping it in a safe condition. *Plummer v. Dill*, 463.
4. **TRESPASSERS AND LICENSEES GOING UPON THE PREMISES OF ANOTHER** take them as they find them, and run such risks as are incident to the existing condition of the premises, and therefore cannot complain of their needing repairs, nor recover for injuries received from the condition in which they find the premises, but may recover for injuries resulting from the subsequent negligence of the owner while they are on the premises. *Woolwine v. Chesapeake etc. R'y Co.*, 859.
5. **LICENSEE UPON PREMISES, WHO IS.**—One who goes to a building for his own convenience to inquire about a matter which concerns himself alone and not for the purpose of transacting with any occupant any kind of business in which such occupant was engaged, nor in the transaction of any kind of business for which the building was used or designed to be used, is a mere licensee, and cannot recover for injuries received from the unsafe or dangerous condition of the premises. *Plummer v. Dill*, 463.
6. **LICENSEES, DUTY TO.**—One who goes into a telegraph office for the purpose of paying a social visit to the operator there, who is an old ac-

quaintance, is not a person to whom the corporation owning and maintaining the office owes any special duty, and therefore he cannot recover for injuries sustained from the dangerous condition of the premises arising from the previous negligence of one of the owner's employees. *Woolwine v. Chesapeake etc R'y Co.*, 859.

See ATTACHMENT; DAMAGES, 4; DEEDS; DETINUE; DURESS, 3; EJECTMENT; ELEVATORS, 1-5; GIFTS; LIS PENDENS; NUISANCES; RAILROADS, 2, 3; SPECIFIC PERFORMANCE; SUBROGATION, 2.

REALTY.

See REAL PROPERTY.

REBUTTAL.

See FRAUD.

RECORD.

See APPEAL, 7, 9; CORPORATIONS, 19, 23; EQUITY, 2, 4; JUDGMENTS, 1; REWARD.

REDEMPTION.

See EXECUTION, 4, 5; JUDGMENTS, 20; MORTGAGES, 8.

REFORMATION.

See MORTGAGES, 4.

REGISTRATION.

See CORPORATIONS, 7, 8.

RELEASE.

See ACTIONS; NEGLIGENCE, 14, 15.

REMAINDERS.

See DEVISE, 2; ESTOPPEL, 1; PARTITION; WILLS, 2.

RENTS.

See DAMAGES, 7; LANDLORD AND TENANT, 2, 3; MORTGAGES, 5; TROVER, 1.

REPLEVIN.

IN ORDER TO CONSTITUTE VALID LEVY in replevin the act of taking possession must be of such character as would make the officer if not protected by the process, liable for trespass. *State v. Beckner*, 257.

See SHERIFFS, 2, 3; SHIPPING, 4.

REPRESENTATIONS.

See HUSBAND AND WIFE, 1; INSURANCE, 14.

RESCISSION.

See SALES, 3.

RESERVATIONS.

See DEEDS, 4, 5.

RES GESTÆ

See EVIDENCE, 6.

RESISTING OFFICERS.

See ACCESSORIES, 1, 2; HOMICIDE, 1, 2.

RESPONDEAT SUPERIOR.

See RAILROADS, 52.

RESTRAINT OF TRADE.

See CONTRACTS, 3-5; CORPORATIONS, 2.

RESTRICTIONS.

See DEEDS, 5.

REVERSAL.

See PLEADING, 2.

REWARDS.

1. WHO ENTITLED TO. — If a reward is offered to any person furnishing evidence which will lead to the arrest and conviction of the person who committed a specified crime, it is not necessary that the person claiming such reward should be the first or only person giving information, if he was the person giving the first effective information which led to the arrest and conviction. *Brown v. Bradlee*, 430.
2. EVIDENCE TO PROVE THAT THE GUILTY PARTY HAD BEEN BROUGHT TO JUSTICE. — The record of the conviction of a person for the shooting of another and his admission of his guilt, are admissible in evidence against persons who offered a reward for the arrest and conviction of the person guilty of such shooting, for the purpose of proving that the person so convicted was guilty, and that the reward had been earned by the persons who caused his arrest and conviction. *Brown v. Bradlee*, 430.

RIGHT OF WAY.

See MUNICIPAL CORPORATIONS, 5; RAILROADS, 3; VENDOR AND PURCHASER.

ROBBERY.

INDICTMENT FOR ATTEMPT TO ROB — SUFFICIENCY OF. — An indictment charging that the accused and another attempted to commit robbery by attempting to take by force a sum of money belonging to a certain third person, by violence to his person, and by putting him in fear of some immediate injury to his person, is sufficient as charging an attempt to rob. *State v. Montgomery*, 684.

SALARY.

See OFFICERS, 2-4.

SALES.

1. STATUTE OF FRAUDS — CONTRACT FOR MANUFACTURED GOODS, WHEN WITHIN. — When a contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the same time a manufacturer, and a dealer in them as a merchant, or so dealing

has them manufactured for his trade by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware, the quantity required, and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures, or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care, or personal skill, or the use of material, or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not in existence at the time the contract is made, but are to be thereafter made and delivered. *Pratt v. Miller*, 656.

2. **SALE, CONDITIONAL UPON PAYMENT.** — If a sale of machinery is upon condition that it shall remain the property of the vendee until paid for, this condition is valid, and cannot constitute a fraud upon the creditors of the vendee. Neither is the transaction rendered fraudulent, as against such creditors, by an agreement that the vendee may manufacture certain of the materials so sold to him, and may sell the manufactured articles upon condition that the proceeds of the sale shall be accounted for and paid to the vendor, to be applied to the purchase price of the property. *Prentiss Tool etc. Co. v. Schirmer*, 737.
 3. **SALES AND REALES — RESCISSION OF CONTRACT — AGENCY.** — When a buyer refuses to receive and pay for goods delivered to him under a contract of sale, the seller has a right either to rescind the contract or resell the goods and recover the difference in price from the buyer. Such resale is not, *per se*, evidence of a rescission of the contract, as the seller, in the making the resale, is regarded as the agent of the buyer. *Grist v. Williams*, 782.
 4. **CONTRACT HAVING A VIEW TO A VIOLATION OF THE LAWS OF A SISTER STATE.** — The sale and delivery of liquors in Massachusetts with a view of having them resold by the purchaser in Maine, in violation of the laws of the latter state, will not sustain an action in the former state for the price agreed to be paid for such liquors. *Graves v. Johnson*, 446.
- See** CONTRACTS, 2, 4, 5; CORPORATIONS, 8-12; EXECUTION, 7; FRAUD; GOODWILL, 2, 3, 5; HOMESTEAD, 1; NEGLIGENCE, 9; VENDOR AND PURCHASER.

SCHOOLS.

See MUNICIPAL CORPORATIONS.

SEAL.

See CORPORATIONS, 19; HOMICIDE, 2, 5; NEGLIGENCE, 14, 15.

SECURITY.

See INSOLVENCY.

SELF-DEFENSE.

See HOMICIDE, 2, 5.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 5, 6.

SERVANTS.

See MASTER AND SERVANT, 2.

SERVICES.

See CORPORATIONS, 18.

SET-OFF.

See CORPORATIONS, 16, 17.

SHERIFFS.

1. **SHERIFFS AND CONSTABLES—UNLAWFUL LEVY—LIABILITY OF SURETIES.** When an officer in discharging his official duties commits a trespass by breaking open an outer door in attempting to execute civil process in replevin, he and his bondsmen are liable in damages for all injuries received by the householder in resisting such unlawful levy. *State v. Beckner*, 257.
2. **BREAKING OUTER DOOR TO COMPLETE LEVY, WHEN JUSTIFIED.**—When an officer has, in obedience to his writ of replevin and in its partial execution, taken possession of the property and gone away, he may, upon his return to complete the levy, if necessary, break open an outer door without committing a trespass. *State v. Beckner*, 257.
3. **TRESPASS IN BREAKING OUTER DOOR TO EXECUTE CIVIL PROCESS—RIGHT OF HOUSEHOLDER TO RESIST.**—An officer is not justified in breaking open an outer door or window in order to execute civil process, as a writ of replevin. If he does break open such door or window, he commits a trespass which renders his subsequent acts unlawful, and justifies the householder in resisting his further progress in serving the writ. *State v. Beckner*, 257.

See PROCESS, 7.

SHIPPING.

1. **PART OWNERS OF SHIPS—RIGHTS AND LIABILITIES.**—The majority owner in a ship is entitled to its possession and management, and the minority owners, unless they expressly dissent, are bound by his acts. He represents them as their agent, they having the right and duty to share ratably in the profits and losses of the joint enterprise. *Swift v. Tatner*, 101.
2. **PART OWNERS OF SHIPS—RIGHTS AND LIABILITIES.**—The minority owners in a ship can avoid liability and loss in any particular venture entered into by the majority owner from which they expressly dissent by requiring him to give bond for the safe return of the ship. *Swift v. Tatner*, 101.
3. **PART OWNERS OF SHIPS—RIGHTS AND LIABILITIES.**—The minority owners of a ship, unless they dissent from, are presumed to agree to, the voyage contracted for by the majority owner and to all the liabilities occasioned by it. The burden is on them to show their dissent and consequent non-liability. *Swift v. Tatner*, 101.
4. **RIGHT OF MASTER TO RECOVER FOR DETENTION—PLEADINGS AND PROOFS.**—When a ship is detained by reason of an attachment against several persons as joint owners, and the master of the vessel sues all the defendants in the attachment for his wages and loss caused by such detention, he must establish the joint ownership as alleged in order to recover, although the defendants replevied the ship after its

seizure under the attachment. Under the statute no admission of ownership or interest in the ship can be implied from the mere act of replevying it. *Swift v. Tatner*, 101.

5. **RIGHT OF MASTER TO UNCOLLECTED FREIGHTS.** — When the master of a ship fails in his duty to collect of the charterer freights in which he has an interest and for which both himself and the shipowner have a lien upon the cargo, he cannot hold the owner liable for his interest in such uncollected freights unless the owner interfered to prevent payment by the charterer. *Swift v. Tatner*, 101.
6. **RIGHT OF MASTER TO WAGES DURING DETENTION.** — When the master of a ship is in the service of its owners, whose duty it is to immediately release the ship when seized under legal process against them, he may recover his wages from them during the time that the ship is detained by such seizure without his fault, unless his contract stipulates to the contrary. *Swift v. Tatner*, 101.
7. **CONSTRUCTION OF CHARTER-PARTY.** — When it is doubtful on the face of a charter-party whether or not it was intended to clothe the charterer with ownership in the ship, the presumption is against such intention. As between the two possible constructions, the law inclines to a contract of affreightment rather than a contract of ownership or lease of the ship. *Swift v. Tatner*, 101.
8. **CONSTRUCTION OF CHARTER-PARTY.** — When a charter-party contains only matter of contract, stipulating that the ship shall, within a certain time, perform certain voyages with specified cargoes and the captain make proper delivery thereof, freight in a fixed sum to be paid each trip, upon delivery of the cargo in the charterer's port; reserving a lien for freight on the cargo in favor of the captain or owners, and sufficient room in the ship for tackle, officers, and crew; and providing that the ship shall carry on any outward trip lumber or such cargo as the charterer desires free of freight charge, the charterer not undertaking to man or victual the ship, or to bear any risks or expenses of the voyage, constitutes a contract of affreightment, and not a lease of the ship, and the master is the servant of the owner thereof, and not of the charterer of the ship. *Swift v. Tatner*, 101.

SLANDER.

1. **PLEADING.** — In an action for slander, a plea of privileged communication may be joined with a plea of the general issue. The speaking of the words need not be expressly admitted by plea, but may be admitted hypothetically. In such case the defendant may be compelled upon the trial to elect upon which plea he will rely. *Jones v. Forehand*, 81.
2. **PLEADING PRIVILEGED COMMUNICATION.** — A plea of privileged communication in an action for slander, which shows that the occasion was privileged, is not insufficient because it fails to show that the words were spoken under such circumstances as to make them privileged. *Jones v. Forehand*, 81.
3. **FROM LANGUAGE PER SE SLANDEROUS MALICE IS INFERRED**, but this inference may always be rebutted by proof of the occasion, or other circumstances of justification. *Jones v. Forehand*, 81.
4. **PRIVILEGED COMMUNICATION.** — A communication, to be privileged, must be spoken with reference to the subject-matter in hand. If the speaker goes further and makes a defamatory charge against the

plaintiff about something having nothing to do with the matter in hand, it is not protected. Nor can the privilege be made to depend merely upon the defendant's good faith and belief in the relevancy of the statement made, and not in any degree upon its actual relevancy to the subject-matter. *Jones v. Forehand*, 81.

5. EVIDENCE OF PRIVILEGED COMMUNICATION. — When in an action for slander the occasion on which the words were spoken is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible in evidence. *Jones v. Forehand*, 81.
6. EVIDENCE OF PRIVILEGED COMMUNICATION. — The defendant in an action for slander cannot testify that the communication alleged was privileged. This is a question of law arising from the occasion and the relation of the parties. *Jones v. Forehand*, 81.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY. — A contract by which an owner for a valuable consideration binds himself to convey his land to another upon condition that such other shall, within a specified time, accept his offer and comply with the terms proposed, may be specifically enforced. *Warren v. Castello*, 669.
2. SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY TO MARRIED WOMEN — WANT OF CONSIDERATION. — A contract by which an owner voluntarily and without any consideration attempts to bind himself to make a deed of a tract of land within a certain time to a married woman, who expressly stipulates not to be bound by the contract, will not be specifically enforced, because of want of consideration and of mutuality both of obligation and of remedy. *Warren v. Castello*, 669.

See VENDOR AND PURCHASER, 3.

STATES.

- See CONTRACTS, 2; CRIMINAL LAW, 1; EVIDENCE, 1; HOMESTEAD, 1; JUDGMENTS, 7-12; JURISDICTION, 3, 5; LEGISLATURE; LIMITATIONS OF ACTIONS, 2, 3; NEGOTIABLE INSTRUMENTS, 12-15; PROCESS, 2, 3, 5, 8, 9; SALES, 4; STATUTES, 7.

STATIONS.

See RAILROADS, 8, 9.

STATUTE OF FRAUDS.

See SALES, 1.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. CONSTRUCTION OF GENERAL WORDS in a statute following an enumeration of particular cases, apply to cases of the same kind and description. A statute enumerating things inferior cannot, by general words, be construed so as to extend to and embrace those which are superior. *Ambler v. Whipple*, 202.
2. CONSTRUCTION OF. — The words of one statute may be required to be enlarged in their meaning, while in another statute the language may

from the context be necessarily limited and contracted in its scope and operation. *Ambler v. Whipple*, 202.

3. CONSTRUCTION OF. — A statute should be so construed as to make it consistent in all its parts, and so that proper effect may be given to every section, clause, or part of it. *Ambler v. Whipple*, 202.
4. CONSTRUCTION OF. — IF EXCLUSIVE RIGHTS OR FRANCHISES ARE CLAIMED to have been granted by a statute impairing the power of the legislature for further action, the statute should be construed most strictly in favor of the state, and all doubts resolved against the person claiming the exclusive right. *Long v. Duluth*, 547.
5. JURISDICTION. — PROCEEDINGS DIFFERING FROM THE COURSE OF THE COMMON LAW are invalid unless all the material directions of the statute are strictly complied with. *Wilson v. St. Louis etc. R'y Co.*, 624.
6. STRICT COMPLIANCE WITH STATUTORY DIRECTIONS ESSENTIAL, WHEN. — Wherever proceedings which differ from the course of the common law are intended to result in an adjudication, a strict compliance with all material directions of the statute is essential. *Wilson v. St. Louis etc. R'y Co.*, 624.
7. STATUTES OF ANOTHER STATE, ADOPTION OF — PRIOR JUDICIAL CONSTRUCTION. — In adopting the statute of another state, or of a foreign country, it is to be presumed that the legislature adopts it as construed by the courts of the state or country from which it is taken; but the force of this presumption must always depend upon the extent to which the terms of the statute have acquired a known and settled meaning, and a definite application at the time of its adoption in the courts of the jurisdiction from which it is taken, and while such construction has more weight than a construction of the same statute by the courts of the country from which it is adopted subsequent to its adoption elsewhere, yet it can never amount to more than persuasive authority as to the true intent and meaning of the statute, and the proper application of its terms; or be permitted to prevail against the general policy of the laws and the practice of the country of its adoption. *Pratt v. Miller*, 656.
8. POLICE POWER — SLAUGHTER OF HORSES SUPPOSED TO HAVE GLANDERS NOT VALID EXERCISE OF. — To permit the board of live-stock commissioners to determine, *ex parte*, that some of a man's horses have the glanders and that others have been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon the board the burden of establishing affirmatively the actual existence of such disease and exposure, would not be a valid exercise of the police power of the state, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. *Pearson v. Zehr*, 113.
9. CONSTITUTIONAL LAW — RAILROAD COMMISSION — JUDICIAL POWERS OF. A statute creating a railroad commission, with power to prescribe rules for the regulation of freights and fares within the state, may confer judicial powers upon it and define its jurisdiction so long as such jurisdiction is inferior to that of the supreme court; nor is the statute void for failing to provide in detail methods of procedure. Such details may be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with law, as are necessary to the exercise of the powers conferred. *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 805.

10. CONSTITUTIONAL LAW — RAILROAD COMMISSION — ENFORCEMENT OF PENALTY FOR VIOLATION OF RULES. — A statute giving power to a railroad commission to prescribe rules and regulations as to freights and fares, and providing that upon the failure of any railroad company to make full recompense for a violation thereof, the commission may proceed in the courts after notice to enforce the penalties prescribed for a violation of such rules, is valid, although it fails to provide in detail the method of procedure. *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 805.

See ATTACHMENT, 1; CONSTITUTIONS, 2, 4; CORPORATIONS, 3, 11; CRIMINAL LAW, 1; DEEDS, 2; ELECTIONS, 3-7; EMINENT DOMAIN, 1, 2; EQUITY, 2; EVIDENCE, 13; EXECUTION, 1, 9; GAMING; JUDGMENTS, 4, 13, 16, 23, 26, 27; MARRIAGE AND DIVORCE, 2; MUNICIPAL CORPORATIONS, 9, 10, 13-15; NEGOTIABLE INSTRUMENTS, 17; OFFICERS, 5; PROCESS, 5; RAILROADS, 4, 11, 35, 60; RAPE, 1, 4-6; SHIPPING, 4; TROVER, 1.

STOCK.

See CORPORATIONS, 3-17, 23.

STOCKHOLDERS.

See CORPORATIONS, 3, 9, 12, 15-17, 20; PROCESS, 5.

STREET RAILWAYS.

See RAILROADS, 59-62.

STREETS.

See BOUNDARIES, 2; DAMAGES, 4; DEEDS, 4; EVIDENCE, 8; MUNICIPAL CORPORATIONS, 5-8, 11, 12; NEGLIGENCE, 6; RAILROADS, 1; VENDOR AND PURCHASER, 2; WATERCOURSES, 1, 2.

SUBROGATION.

1. SUBROGATION IS NOT FOUNDED UPON CONTRACT, but is a creation of equity existing solely for accomplishing the ends of substantial justice, and being controlled by equitable principles, will be entertained only when there is an equity to invoke and no innocent person will be injured. *Emmert v. Thompson*, 566.
2. SUBROGATION TO DISCHARGED SECURITIES. — One who lends money for the express purpose of taking up and discharging liens upon real property, and who discharges those liens at the request of the debtor, expecting that his securities will of record take the place of that which he discharged, is not a volunteer, stranger, nor intermeddler, and therefore, if justice requires it, may be subrogated to the lien thus discharged and allowed to assert it, as where he discharges liens in the belief that none other exist against the property, and afterwards learns of liens subordinate to those discharged which are attempted to be asserted against him as having priority to the lien taken by him upon the same property to secure his advances. Nor will the fact that the lien of which he was ignorant was of record, defeat his claim for relief. *Emmert v. Thompson*, 566.
3. MERGER — CAUSE OF ACTION CANNOT BE SPLIT UP AND RECOVERY HAD ON PORTION ONLY OF CLAIM. — A party seeking to enforce a claim must present all the grounds upon which he expects a judgment, and cannot split up his demand or prosecute it piecemeal. Where, therefore, an

insurance company pays to the insured a portion of the loss sustained by him through the alleged negligence of a third person, and is subrogated to a proportionate amount of the claim of the insured against such third person, the company cannot maintain an action for the recovery of the portion of the claim covered by the subrogation. *Continental Ins. Co. v. The H. M. Loud etc. Lumber Co.*, 494.

SUBSCRIPTION.

See CORPORATIONS, 13.

SUFFRAGE.

See ELECTIONS.

SUMMONS.

See PROCESS.

SURETYSHIP.

See JUDGMENTS, 3; MORTGAGES, 1; SHERIFFS, 1.

SURVIVOR.

See HUSBAND AND WIFE, 6.

TAXES.

See DAMAGES, 7; LANDLORD AND TENANT, 2, 3; MUNICIPAL CORPORATIONS, 11.

TELEGRAPHS.

1. **DAMAGES FOR NEGLIGENCE IN FAILING TO TRANSMIT OR DELIVER PROPERLY.** — When a contract to transmit and deliver a telegraphic message exists, a failure to perform the undertaking is either excusable or negligent, without regard to any degree of negligence, and if negligent, the party injured is entitled to damages, not according to the degree of negligence, but in proportion to his injury, unless it is a case in which punitive damages may be allowed. *Brown v. Postal Tel. Co.*, 793.
2. **VOID REGULATION AS TO REPEATING MESSAGES.** — A stipulation contained in a form used by a telegraph company in its business operations to the effect that it will not be responsible in damages for mistakes or delays in transmitting unrepeatd messages, is void as against public policy, and the further stipulation that the company will be liable only in a limited amount for such mistakes or delays in respect to repeated messages, is void for the same reason. *Brown v. Postal Tel. Co.*, 793.
3. **POWER TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE.** — The rule that no one can provide by contract against liability for negligence in any degree, applies as well to telegraph companies as to other corporations and persons. *Brown v. Postal Tel. Co.*, 793.

See REAL PROPERTY, 6.

TENANTS IN COMMON.

See CO-TENANCY; DEVISE, 1, 3.

THREATS.

See HOMICIDE, 3.

TORT-FEASORS.

See MUNICIPAL CORPORATIONS, 18.

TRADE-MARKS.

TRADE-MARKS AND NAMES. — THE DISTINCTION BETWEEN A TRADE-MARK AND A TRADE-NAME is, that the former owes its existence to the fact that it is actually affixed to a vendible commodity, whereas the latter is a mere property allied to the good-will of the business. *Vonderbank v. Schmidt*, 336.

TRANSFER.

See CORPORATIONS, 3, 4, 7, 10-12.

TRESPASS.

See ANIMALS, 1; DAMAGES, 3; JUDGMENTS, 6; LIS PENDENS; MUNICIPAL CORPORATIONS, 18; REPLEVIN; SHERIFFS.

TRESPASSERS.

See RAILROADS, 22-29, 32; REAL PROPERTY, 4.

TRIAL.

1. **READING AUTHORITIES TO JURY, WHEN PERMISSIBLE.** — When the defendant's counsel, in arguing the case to the jury on a criminal trial, reads from and comments upon legal authorities, the state's attorney may reply to the propositions of law advanced by reading what another author has said in answer to such view of the same proposition. *Palmer v. People*, 146.
2. **COMMON KNOWLEDGE AND COMMON EXPERIENCE** are parts of the trial of every civil issue without special proof, and the jurors are authorized to draw inferences from such knowledge and experience. *Gunn v. Ohio River R. R. Co.*, 842.
3. **INSTRUCTIONS WHEN PROPERLY REFUSED.** — Prayers for instructions already covered, and embraced in instructions given for the same party, are properly refused. *Cover v. Myers*, 394.
4. **INSTRUCTIONS WHEN PROPERLY REFUSED.** — Request for instructions on the part of a party, each segregating a certain fact, and asking the court to declare that such fact is not legally sufficient to authorize a finding against the proof of such party, and that the jury is not at liberty to consider such fact to defeat the right of such party to recover, is properly refused. *Cover v. Myers*, 394.
5. **INSTRUCTIONS WHEN PROPERLY REFUSED.** — Instructions which assume a fact about which there is a controversy and which single out and give undue prominence to a single circumstance as characterizing the conduct of a party instead of leaving it to the jury to pass upon such conduct on a view of all the facts and circumstances in the case, are properly refused. *Lake Shore etc. Ry Co. v. Bolemer*, 218.
6. **INSTRUCTIONS INCONSISTENT OR REPEATED.** — An instruction which is inconsistent with others already asked is properly refused, and so is one that assumes a fact contrary to the evidence of the party asking it, and whose substance has been already given in another instruction. *Palmer v. People*, 146.

7. **SUBMISSION OF ISSUES — DISCRETION OF COURT.** — When any specific view of the law, arising out of the testimony, may be presented to the jury through the medium of pertinent instructions upon the issues submitted, the court may properly refuse to submit additional issues. *Blackwell v. Lynchburg etc. R. R. Co.*, 786.
 8. **INSTRUCTIONS DIRECTING VERDICT.** — The court may properly instruct the jury to return a verdict for the defendant when the evidence, with all the inferences to be drawn therefrom, is so insufficient to support a verdict for the plaintiff that the court will be compelled to set it aside. The court may direct a verdict for the defendant if there is no evidence tending to prove an issue of fact essential to the right of recovery of the plaintiff; but such an instruction is properly refused if there is a conflict in the evidence and there is evidence tending to prove the plaintiff's case. *Ambler v. Whipple*, 202.
 9. **VERDICT WHEN MAY BE DIRECTED BY THE COURT.** — When the evidence given at a trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant. *Woolwine v. Chesapeake etc. R'y Co.*, 859.
 10. **IMPEACHMENT OF VERDICT BY AFFIDAVIT OF JURORS NOT ALLOWED.** — Affidavits of jurymen, or affidavits as to statements made by them, cannot be received to impeach their verdict. *Palmer v. People*, 146.
 11. **VIEW OF THE PREMISES.** — Under a statute declaring that the jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision, the trial court is vested with such a discretion that its action in granting or denying a motion to have the jury view the place where the accident occurred will rarely be reviewed by the appellate court. *Gunn v. Ohio River R. R. Co.*, 842.
- See APPEAL; CONSTITUTIONS, 1, 2; DAMAGES, 2, 8; EVIDENCE, 6; FORGERY, 4; FRAUD.**

TROVER.

1. **TROVER MAINTAINABLE FOR TIMBER CUT ON AND REMOVED FROM LAND WHILE HELD ADVERSELY.** — A person who has recovered land in an action of ejectment may maintain an action of trover for timber cut upon and removed from the premises by the defendant while in possession under claim of right; and such action is not barred by a judgment for damages for the rental value of the land recovered by the plaintiff on a claim for rents and profits filed and prosecuted under the Michigan statute. *Wilson v. Hoffman*, 485.
2. **TROVER MAINTAINABLE BY ONE HAVING RIGHT TO POSSESSION.** — In Michigan trover may be maintained by one who has the right to possession, and the actual possession of a plaintiff acquired by ejectment relates to the time when his title was acquired. *Wilson v. Hoffman*, 485.
3. **LESSEE OF MINING LAND MAY MAINTAIN TROVER FOR CONVERSION OF UNMINED ORE, WHEN.** — Where a lessee has possession of land under a mining lease which gives him the exclusive right, during a certain number of years, to mine ore therein, requires him to mine not less than a specified number of tons of ore each year, and as much more as can be

reasonably mined, and to pay a royalty on such specified number of tons every year, whether mined or not, and, in case he does not mine that number of tons in any one year, credits the excess of royalty paid for that year on any excess of ore mined in any succeeding year, he has such a property in the unmined ore in the land as will enable him to maintain trover for its wrongful conversion. *Hartford etc. Min. Co. v. Cambria Min. Co.*, 488.

4. **TROVER LIES FOR ORE MINED BY PARTY IN POSSESSION UNDER CLAIM OF RIGHT, WHEN.** — A lessee of mining land may maintain an action of trover against a person who was in the actual possession under a claim of right, for the wrongful conversion by the latter of unmined ore in the land, where the only possession he had was such as enabled him to mine and convert the ore, and his claim of title was afterwards decided against him. *Hartford etc. Min. Co. v. Cambria Min. Co.*, 488.
5. **MEASURE OF DAMAGES IN TROVER FOR CONVERSION OF UNMINED ORE.** — In an action of trover by a lessee of mining land against a party for the wrongful conversion of unmined ore in the land, a rule of damages which allows the plaintiff to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by the defendant to the lessor, is sufficiently favorable to the defendant. *Hartford etc. Min. Co. v. Cambria Min. Co.*, 488.

TRUSTS.

1. **TRUSTS PRECATORY.** — If property is given for the absolute benefit of, or to be at the disposal of the donee, especially if such donee be a parent, no trust will be created by subsequent words showing that the maintenance of children was the motive of the gift. *Seamonds v. Hodge*, 854.
 2. **A TRUST IS NOT CREATED BY A MERE USE OF WORDS INDICATING THE MOTIVE** of gift, as where its purpose is expressed as being to enable the donee to maintain his children, or pay his debts, or the like. *Seamonds v. Hodge*, 854.
 3. **TRUST FUND CAN BE PURSUED ONLY WHILE MEANS OF IDENTIFYING IT EXIST.** — A trust fund which has been wrongfully converted into other property may, so long as its identity can be traced, be pursued and held liable in its new form to the rights of the *cestui que trust*, except as against a *bona fide* purchaser without notice; but the right to pursue it fails when the means of ascertaining its identity are lost. This is always the case when the subject-matter is turned into money, or becomes mixed and confounded in a general mass of property of the same description. Where, therefore, a merchant, by false and fraudulent representations of his financial condition, procures the loan of money to be used in his business, and invests such loan in the purchase of goods which are mixed with others so as to be incapable of identification, a court of equity will not hold the borrower to be a trustee of the lender. The relation of the parties in such a case is simply that of debtor and creditor. *Union Nat. Bank v. Goetz*, 119.
- See ATTORNEY AND CLIENT; BEQUESTS; DEVISE, 2; ESTATES; HUSBAND AND WIFE, 2, 5; LANDLORD AND TENANT, 2; MORTGAGES, 1; MUNICIPAL CORPORATIONS, 2; NEGOTIABLE INSTRUMENTS, 10.

USAGE.

See CORPORATIONS, 3; JUDGMENTS, 8.

USURY.

See NEGOTIABLE INSTRUMENTS, 5, 12, 14.

VARIANCE.

See FORGERY, 7.

VENDOR AND PURCHASER.

1. CONVEYANCE — CONDITIONS, NOTICE OF. — EVERY PURCHASER of an estate has constructive notice of, and is bound by, conditions subsequent contained in a conveyance through which he derives title. *Sioux City etc. R. R. Co. v. Singer*, 554.
2. FALSE REPRESENTATIONS. — AN ACTION FOR DECEIT may be maintained for falsely representing that a street upon which a lot was situated and which was a part of the grantor's land actually extended from a public street, and that the grantor had the right to open the street so as to make it continuous and to connect with such public street, and by means of such representation inducing plaintiff to purchase such lot, if the non-existence of the right of way to a public street was not open to be ascertained by ocular inspection of the premises. It is not material that the right of way was not mentioned in the conveyance of the land if such conveyance purported to convey the lot with all privileges and appurtenances thereto belonging. *Durkin v. Cobleigh*, 436.
3. WAIVER OF TIME OF PERFORMANCE. — If a contract for the sale of real property designates a time when the vendor is to make a conveyance, and he is not able to make it at that time, the right of the vendee to object to delay is waived by a subsequent oral agreement under which he was authorized to take and did take and hold possession and under which he still has possession when the conveyance is tendered, and the action brought for a specific performance. *Kent v. Church of St. Michael*, 693.

See DEEDS; EQUITY, 3; INSURANCE, 1, 5; LIS PENDENS; SPECIFIC PERFORMANCE.

VERDICT.

See TRIAL, 9, 10.

VESSELS.

See SHIPPING.

VESTED INTEREST.

See HUSBAND AND WIFE, 4.

VETERINARY SURGEONS.

See WITNESSES, 2.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 6-9; RAILROADS, 41, 52-57.

VIEWING PREMISES.

See TRIAL, 11.

WAGERS.

See GAMING.

WAGES.

See SHIPPING, 4, 6.

WAIVER.

See APPEAL, 3; INSURANCE, 11; JUDGMENTS, 26; JURISDICTION, 4; PLEADING, 3; RAILROADS, 38; VENDOR AND PURCHASER, 3;

WARRANT OF ATTORNEY.

See JUDGMENTS, 23-25.

WARRANTS.

See HOMICIDE, 1, 2, 4, 5.

WARRANTY.

See INSURANCE, 14.

WATER COMPANIES.

See MUNICIPAL CORPORATIONS, 10.

WATERCOURSES.

1. **MUNICIPAL CONTROL OVER.** — When a franchise is granted by a city to construct ways or streets across a navigable waterway, there is no implied right to destroy the waterway. It must be so bridged that its use will not be unnecessarily impaired. The right of navigation and the right of crossing the waterway are equal. *Ligare v. Chicago*, 179.
2. **MUNICIPAL CONTROL OVER.** — A city, under its power to lay out, open, and improve streets, has no implied power to authorize the taking or destruction of a navigable watercourse. To authorize such taking or destruction, express power in the city to grant the right must be shown. *Ligare v. Chicago*, 179.
3. **FLOODS.** — A railroad company, in constructing and maintaining embankments bordering upon a watercourse, is bound not only to anticipate and provide for the flow of the natural rise and fall of the waters during the year, but also for the floods and freshets which occur at longer periods or intervals, and which, from having been known to occur, may reasonably be expected again. *Ohio etc. R'y Co. v. Ramey*, 176.
4. **FLOODS — DUTY TO PROVIDE AGAINST.** — Although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. *Ohio etc. R'y Co. v. Ramey*, 176.
5. **FLOODS — LIABILITY FOR INJURIES RESULTING FROM.** — In an action against a railroad company to recover damages for the obstruction of the flow of water in a stream by an embankment and thereby overflowing adjoining lands, the company is liable if it has not provided for the escape of the water of such unusual or extraordinary floods, as it should reasonably have anticipated would occasionally occur in the future, because they had occasionally occurred at intervals, though of irregular duration, in the past. *Ohio etc. R'y Co. v. Ramey*, 176.

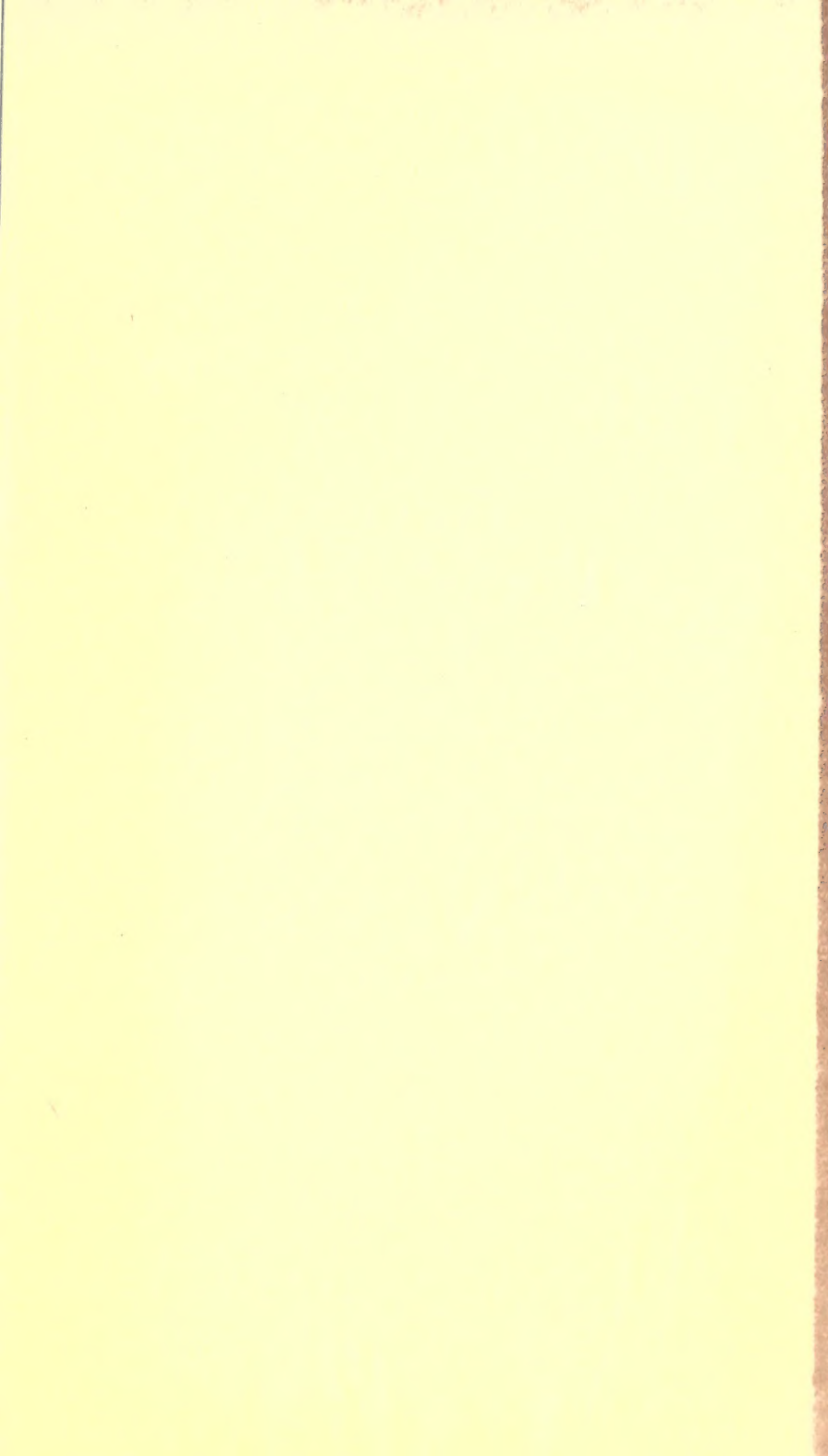
WILLS.

1. **HOW CONSTRUED — INTENTION.** — The sole purpose of the construction of a will is to find and declare the intention of the testator, that effect may be given to such intention when not contrary to public policy or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible. *Dickison v. Dickison*, 163.
2. **CONSTRUCTION OF.** — If a will is capable of two constructions, one of which will exclude the issue of a deceased child, and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted. *Soper v. Brown*, 731.
3. **CONSTRUCTION OF CLAUSE IN.** — A clause in a will stating that "my mother is to have \$150 out of my estate annually as long as she lives, and that she remain with my wife during the remainder of her life," imposes no charge upon the testator's estate for the board of his mother. *Martin v. Goode*, 799.
4. **RESIDUARY CLAUSE IN WILL, HOW CONSTRUED.** — A general residuary clause in a will, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will generally be construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of, and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise. *Dickison v. Dickison*, 163.
5. **REPUGNANT WORDS IN ANY PART OF WILL REJECTED OR TRANSPOSED, WHEN.** — Repugnant words, in whatever portion of a will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed, or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested. *Dickison v. Dickison*, 163.
6. **GENERAL PROVISIONS OF WILL GIVE WAY TO SPECIFIC PROVISIONS.** — General provisions in a will must give way to specific provisions, and where there is a general devise of property in one part of the will and a specific disposition of the same property in another part, these are to be regarded, generally, as excepted out of the general devise. *Dickison v. Dickison*, 163.
7. **RELATIVE ORDER OF DEVISES MAY BE REVERSED IN ORDER TO GIVE EFFECT TO EACH.** — The rule which sacrifices the former clause in a will because inconsistent with a later one is never applied, except upon failure to give such construction as renders the whole will effective and allows each provision to stand. It is, therefore, permissible, in order to enable the court to uphold all the provisions of the will, to resort to every reasonable intendment, to reverse the relative order of the devises or bequests, and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each. *Dickison v. Dickison*, 163.

See BEQUESTS; DEVISE; ESTATES; EVIDENCE, 10; HUSBAND AND WIFE, 1, 3; PLEADING, 6.

WITNESSES.

1. **EVIDENCE OF PREVIOUS IMMORALITY.** — A witness cannot be compelled to testify to his previous immorality when such testimony does not tend directly to prove some issue. *State v. Houz*, 686.
 2. **WITNESSES OTHER THAN VETERINARY SURGEONS MAY TESTIFY AS TO DISEASES OF DOMESTIC ANIMALS.** — Persons other than veterinary surgeons may properly testify in respect to the appearance and symptoms of diseased horses, and give an opinion upon the question of the existence or non-existence of a particular disease or malady in such horses. Farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease, are qualified to state whether in a particular case such characteristics and symptoms do or do not exist; and after detailing facts that show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar. *Pearson v. Zehr*, 113.
- See** ANIMALS, 3; APPEAL, 1; CONSTITUTIONS, 3; EVIDENCE, 4, 6, 7, 13; MORTGAGES, 2; NEGOTIABLE INSTRUMENTS, 9; PROCESS, 8, 9.



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